No. 06-

IN THE
SUPREME COURT OF THE UNITED STATES

LONNELL BREWER,
Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Michael Foreman
(*Counsel of Record*)
Sarah Crawford
Daria E. Neal
Zoe Segal-Reichlin
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW
Suite 400
Washington, DC 20005
(202) 662-8600

Joanna C. Fryer, Attorney At Law
5555 N. Sheridan Road, Suite 241
Chicago, IL, 60640
(773) 275-7375

Michael B. de Leeuw
Darcy M. Goddard
Vivek Reddy
Sarah L. Hinchliff
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

QUESTION PRESENTED FOR REVIEW

Can an employer be held liable under Title VII of the 1964 Civil Rights Act when the discriminatory animus of an intermediate supervisor was a factor in the employer's ultimate decision to impose an adverse employment action, even when there is no evidence that the formal decision-maker personally harbored bias against the affected employee?

PARTIES TO THE PROCEEDINGS

All parties to this action are set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lonnell Brewer respectfully requests this Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Seventh Circuit, entered in this case on March 21, 2007.

OPINIONS BELOW

The March 21, 2007, opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a-37a) is published at 479 F.3d 908. The December 22, 2005, opinion and order of the United States District Court for the Central District of Illinois, Urbana Division, (App. 38a-104a) is published at 407 F. Supp. 2d 946.

STATEMENT OF JURISDICTION

The final judgment of the Court of Appeals was entered on March 21, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-(2)(a), provides:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

> because of such individual's race, color, religion, sex or national origin[.]

Section 703(m) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m), provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

This case raises a question of general and broad importance: What is the appropriate standard for imposing Title VII liability on an employer when an adverse employment decision is based on the racially motivated acts or omissions of a biased intermediate supervisor?[1] The answer to this question will significantly impact an ever-increasing number of American companies and the individuals they employ. In today's progressively complex and global labor market, it is common for final employment decisions to be made by higher-level supervisors or individuals in personnel departments who are insulated from the everyday activities of their employees. Those

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[1] This Court recently received a petition for a writ of *certiorari* in another case, Supreme Court Docket No. 06-1644, which presents a question similar to the one presented in this case. The lower court opinions in that case, however, do not directly address the issue as clearly as the Seventh Circuit opinion does here.

individuals necessarily must rely on the input of intermediate supervisors to make decisions about employees whom the higher-level supervisors neither directly supervise nor monitor.

The circuit courts of appeals are split on what standard should be applied for imposing Title VII liability on an employer when the acts or omissions of a biased intermediate supervisor are part of a decision-making process that leads to an adverse employment decision against a member of a protected class. This split among the circuit courts of appeals is such that employment discrimination cases nationwide are being decided under very different standards, which inevitably leads to irreconcilable outcomes among, and even within, the circuits.

The Court previously recognized the importance of resolving this confusion among the circuits. Indeed, the Court has taken steps to resolve the issue not just once, but twice, by issuing a writ of *certiorari* in *BCI Coca-Cola Bottling Company of Los Angeles v. EEOC*, 450 F.3d 476 (10th Cir. 2004), *cert. granted*, 127 S. Ct. 852 (U.S. Jan. 5, 2007) (No. 06-341), and by inviting the Solicitor General to file a brief expressing the views of the United States while the Court was deciding whether to issue a writ of *certiorari* in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004), *petition for cert. filed*, 2004 WL 1243067 (June 1, 2004) (No. 03-1443). In both cases, however, the petitioners withdrew their petitions before the Court could consider and provide guidance on this important issue. This case presents an opportunity for the Court finally to resolve the split among the circuits, and thus both to clarify the appropriate legal standard and to

provide certainty to employees and businesses nationwide.

I. Background Facts and Issues

This case, which arises under Title VII of the 1964 Civil Rights Act, involves a university student-employee, Lonnell Brewer, who was terminated from his job based on information provided to a higher-level supervisor by a racially biased intermediate supervisor.[2] Specifically, during his two semesters working at the Personnel Services Office ("PSO") at the University of Illinois, Kerrin Thompson, Mr. Brewer's immediate supervisor, made false, disparaging, and racially motivated comments about him to his other supervisors, co-workers, and his professors.[3] These comments included, among other things, referring to

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[2] Mr. Brewer also alleged that he was terminated from his graduate master's program because of his race, in violation of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, and that his employers said unfavorable things about him to his professors in retaliation for his complaints about the supervisor's racism, in violation of Title VII. Brewer's petition for writ of *certiorari* addresses only the Title VII discriminatory firing claim; however, the Seventh Circuit linked the analysis of the Title VI claim to the Title VII claim. (App. at 33a-34a ("As [the Title VI] argument is similar to his Title VII argument, however, it again fails for the same reason....[his supervisor] did not have the singular degree of influence required to make her functionally responsible for Brewer's grades.").) Accordingly, any clarification of the Title VII claim would affect the analysis of the Title VI claim.

[3] Because this case arises in the posture of a motion for summary judgment, the Court is required to view all facts and draw all reasonable inferences in favor of the nonmoving party, Mr. Brewer. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

Mr. Brewer as a "nigger" (App. at 11a), and saying he "lacked urgency about his work" (App. at 5a). Shortly after Ms. Thompson's final confrontation of Mr. Brewer, Ms. Thompson's supervisor, Denise Hendricks, fired Mr. Brewer, allegedly over a misunderstanding involving a parking tag. Ms. Hendricks acknowledged that she received information relating to the parking tag incident directly from Ms. Thompson, and Ms. Hendricks testified that she engaged in only a cursory personal evaluation of the facts underlying the incident. (App. at 12a, 57a.)

Despite this and other evidence in the record that Mr. Brewer was racially targeted by his immediate supervisor, Ms. Thompson, and despite undisputed evidence that his higher-level supervisor, Ms. Hendricks, relied on information provided by Ms. Thompson in deciding whether to terminate Mr. Brewer, the district court nonetheless entered summary judgment in favor of the University and against Mr. Brewer on his Title VII claim. The Seventh Circuit Court of Appeals affirmed the judgment. According to the Seventh Circuit, imposition of liability under Title VII requires that the intermediate supervisor exercise "singular influence" over the firing decision; it is insufficient, according to the Seventh Circuit, that the racially biased actions of an intermediate supervisor motivated the higher-level supervisor's final adverse employment decision.

The standard employed by the Seventh Circuit has been expressly adopted by only one other circuit court of appeals and conflicts both with the express statutory language of Title VII and with the case law of the majority of other circuits. *See* discussion, *infra*, at 15-26. Additionally, the Seventh Circuit's standard

undermines the purposes of Title VII and creates substantial uncertainty for companies and individuals nationwide. *See* discussion, *infra*, at 26-27.

The pertinent facts underlying Mr. Brewer's appeal are set forth below.

A. Mr. Brewer's Employment at the University

Mr. Brewer, an African American, was a student at the University of Illinois at Urbana-Champaign, enrolled in the master's degree program at the University's Institute of Labor and Industrial Relations (ILIR). (App. at 2a.) In addition to receiving merit-based financial aid to help him pay for the academic program, Mr. Brewer was employed as an ILIR research assistant, which provided him a stipend for working at the Personnel Services Office. (App. at 2a-3a.)

Mr. Brewer began his research assistantship at the PSO in early September 1997. (*Id.*) On his first day of work, he met with his immediate supervisor, Kerrin Thompson, who was the assistant to the PSO Director Denise Hendricks. (*Id.*) Ms. Thompson told Mr. Brewer he could work flexible hours and wear jeans and other casual clothes to the office. (*Id.*) Ms. Thompson also gave Mr. Brewer a temporary University parking tag and told him he could park anywhere in the parking lots at the PSO (lot E7) or the ILIR (lot C8) as long as he had his tag on the mirror. (App. at 3a-4a.) The parking tag was handwritten and

purported to grant permission to park in either lot.[4] (App. at 10a.)

In early October 1997, Ms. Thompson's attitude and behavior toward Mr. Brewer grew increasingly hostile. (App. at 4a.) Mr. Brewer believes this change started when Ms. Thompson discovered that Mr. Brewer was engaged to marry a white woman. (*Id.*) Mr. Brewer's co-workers and professors told him that Ms. Thompson had made disparaging remarks about him, specifically that he lacked urgency about his work, that he was absent on days when he should be working, and that he should stop wearing jeans to the office. (App. at 4a-5a.) At one point, Ms. Thompson jeopardized Mr. Brewer's employment by trumpeting to Ms. Hendricks the fact that Mr. Brewer had missed an important deadline (he had, in fact, received a short extension from his project supervisor), and by falsely accusing Mr. Brewer of not working his full schedule. (App. at 7a-8a.)

One day in mid-April 1998, the temporary parking tag Ms. Thompson had given Mr. Brewer at the beginning of the year broke so that it would not hang from his rearview mirror. (App. at 54a.) When Mr. Brewer went to the University's parking service office to have the tag replaced, the clerk discovered that the PSO's application for the tag contained inaccurate information. Parking services informed Mr. Brewer that he should not have a tag to park in the

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[4] The Seventh Circuit concluded that Mr. Brewer "basically admits that he wrote the C8 lot permission on the tag," which Mr. Brewer stated he did because Ms. Thompson "neglected" to do so. (App. at 10a & n.4)

ILIR lot (lot C8).[5] (*Id.*) They issued Mr. Brewer a temporary parking tag pending further investigation. (App. at 10a.)

Parking services then called the PSO and spoke to Ms. Thompson about the parking tag, which they believed contained inaccurate information about where Mr. Brewer was authorized to park. (App. at 54a.) Ms. Thompson informed Ms. Hendricks about the call from parking services, explaining (according to Ms. Thompson's own deposition testimony) that she "had received a call from parking services that . . . one of [the PSO's] hang tags had been altered to allow Lonnie [Mr. Brewer] to park in another lot." (*Id.*) Ms. Thompson did *not* tell Ms. Hendricks that she had told Mr. Brewer that he was authorized to park anywhere in either the PSO lot (lot E7) or the ILIR lot (lot C8).

A few days before April 21, 1998, Mr. Brewer approached Ms. Thompson to discuss the parking tag issue. (App. at 54a-55a.) On seeing Mr. Brewer, Ms. Thompson exclaimed, "I know what you did." (App. at 11a.) Ms. Thompson explained that Mr. Brewer was not supposed to have a parking tag, that she had lied on the application to get him one, and that he should not have gone to parking services. (*Id.*) She told Mr. Brewer that Ms. Hendricks had already talked to the ILIR about the incident, and that his indiscretion could cost him his job. (*Id.*)

When Mr. Brewer reminded Ms. Thompson that she had told him he was authorized to park anywhere in either the PSO lot (lot E7) or the ILIR lot (lot C8), Ms.

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[5] The Seventh Circuit concluded, without explanation or citation to the record, that "[p]arking services suspected that [Mr.] Brewer was not entitled to park anywhere at all." (App. at 10a.)

Thompson said she was "through with you people" and that Mr. Brewer was "a smart one." (*Id.*) Ms. Thompson told Mr. Brewer to go retrieve the temporary parking tag he had been given by parking services, yelling, "I have had it with you nigger, get my tag!" (*Id.*)

Sometime later that day, Ms. Hendricks fired Mr. Brewer from his job at the PSO. (App. at 11a, 56a.) At her deposition, Ms. Hendricks said that she fired Mr. Brewer for "adulterating" the parking tag. (App. at 12a.) Ms. Hendricks also stated that Ms. Thompson had told her that parking services was upset because Mr. Brewer had apparently handwritten "C8" on the tag. (App. at 12a.) Ms. Hendricks admitted that the parking tag issue did not merit termination, but said she feared the PSO would lose "parking flexibility" unless she fired someone. (App. at 11a.)

Ms. Hendricks further testified at her deposition that, prior to deciding to fire Mr. Brewer, she did not contact him to get his side of the story and she did not engage in any independent verification of the facts. (App. at 57a.) To the extent Ms. Hendricks sought independently to investigate the parking tag incident at all, she simply visually inspected the parking tag and verified that it had been altered. (App. at 12a, 57a.) Ms. Hendricks acknowledged that, if she had known about Ms. Thompson's racist comments to and about Mr. Brewer, or that Ms. Thompson had given Mr. Brewer permission to park in the C8 lot, she might have reconsidered firing Mr. Brewer.[6] (App. at 12a-13a.)

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[6] At his deposition, Mr. Brewer testified that he told Ms. Hendricks that Ms. Thompson had given him permission to

Mr. Brewer was fired from the PSO effective April 21, 1998. (App. at 13a.) Subsequently, the ILIR terminated his research assistantship and accompanying financial aid.[7] (*Id.*)

B. Decision of the District Court

The district court granted the University's motion for summary judgment, finding that Mr. Brewer had failed to establish a genuine issue of material fact as to whether Ms. Thompson's racism caused her to withhold exculpatory information about the parking permit incident from Ms. Hendricks.

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park in the "C8" lot. (App. at 12a.) Mr. Brewer also testified that he informed Ms. Hendricks of Ms. Thompson's racist remarks, including her use of the word "nigger." (*Id.*) Mr. Brewer said that Ms. Hendricks replied that she didn't know if Ms. Thompson had said those things but that, either way, it was an issue solely between Ms. Thompson and Mr. Brewer. (*Id.*)

[7] Mr. Brewer was also terminated from his master's program at the end of the Spring 1998 term. He had narrowly missed the required cumulative grade point average for two semesters in a row. (App. at 13a.) The first semester he took five courses instead of the usual four. Although his grades may have suffered from the excessive workload, two of his professors also admitted to penalizing him after learning about his troubles at the PSO. Mr. Brewer's second semester grades showed improvement but were insufficient to raise his cumulative average to the required level. Following Mr. Brewer's receipt of his second semester grades, a committee of professors recommended to the ILIR Director that Mr. Brewer be retained because his poor grades were a reflection of his heavy workload rather than a reflection of poor ability. (*Id.*) The Director rejected the recommendation "based on the incident at the PSO." (*Id.*) These facts form the basis of Mr. Brewer's Title VI claim that he brought against the University. That claim, like the Title VII claim, was dismissed at the summary judgment stage on the same analysis that was applied to the Title VII claim.

(App. at 77a.) Mr. Brewer appealed to the Seventh Circuit.

C. Decision of the Seventh Circuit Court of Appeals

The Seventh Circuit affirmed the district court's ruling. In contrast to the district court, the appellate court found that a jury could reasonably conclude that Ms. Thompson's behavior toward Mr. Brewer was motivated by discriminatory animus. (App. at 19a.) The Seventh Circuit also noted that Ms. Thompson's failure to reveal exculpatory information relating to the parking pass may have influenced Ms. Hendricks' decision to fire Mr. Brewer. (App. at 20a-21a.[8]) The court nonetheless held that "it is not enough just [for a supervisor] to have some minimal amount of influence . . . ." (App. at 21a-22a.) Rather, before an employer may be found liable under Title VII, "an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment" must, for discriminatory reasons, exert her "*singular influence* over an employee who does have such power to harm the plaintiff . . . ." (App. at 20a (emphasis added).)

The Seventh Circuit defined "singular influence" as those situations where the "nominal decision-maker [is] nothing more than the functional decision-maker's cat's paw.'"[9] (App. at 22a (*citing*

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[8] Ms. Hendricks stated that she might not have fired Mr. Brewer had she known that Ms. Thompson had told Mr. Brewer he could park anywhere and that Mr. Brewer's alteration of the tag was an honest mistake.

[9] The term "cat's paw" comes from a fable in which a monkey convinced a cat to pull cashews from a hot fire. Once the cat

Shager v. Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990).) It held that, if the nominal decision-maker receives all of her information from a biased employee and makes a decision based solely on that information, then the employer may be found liable under Title VII. (App. at 22a.) The Seventh Circuit held, however, that an employer is *never* liable when the nominal decision-maker consults *any other source* before making the adverse employment decision. The Seventh Circuit reasoned that this is true even when the decision-maker's investigation of the matter is functionally inadequate to uncover the bias. (App. at 23a ("It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decisionmaker does not artificially or by virtue of her role in the company limit her investigation to information from that source.").)

The Seventh Circuit concluded that Ms. Hendricks' mere act of examining the altered parking tag before deciding whether to fire Mr. Brewer was sufficient to absolve the University of liability for race discrimination. (App. at 29a.) In so holding, the

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did so, burning his paws in the process, the monkey ate all the cashews, leaving none for the cat. As one court has explained:

> In the employment discrimination context, "cat's paw" refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action. The "rubber stamp" doctrine . . . refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate.

BCI Coca-Cola, 450 F.3d at 484.

Seventh Circuit rejected prior Seventh Circuit precedent and the decisional authority of the majority of other circuit courts of appeals.

REASONS FOR GRANTING THE WRIT

This case raises an important issue of federal law that the Court has twice recognized as significant and in need of clarification. It presents an opportunity for the Court to resolve the growing split of opinion among the circuit courts of appeals (and, indeed, within the individual circuit courts) as to the proper standard for holding an employer liable under Title VII when an intermediate supervisor's bias is a factor in an adverse employment action.

I. The Court Has Twice Recognized the Need to Resolve the Question Presented in This Petition.

Twice in the last three years, the Court has taken steps to clarify the very issue raised in this petition. In both prior instances, however, the petitioners chose to withdraw their petitions before the Court was able to analyze and resolve the increasingly divergent case law percolating up through the lower courts. *See BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 450 F.3d 476 (10th Cir. 2004), *cert. granted*, 127 S. Ct. 852 (U.S. Jan. 5, 2007) (No. 06-341), *cert. dismissed*, 127 S. Ct. 1931 (U.S. Apr. 12, 2007); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), *petition for cert. dismissed*, 543 U.S. 1132 (U.S. Jan. 25, 2005) (No. 03-1443).

In 2005, the Court was confronted with the same question presented in this case in a petition for writ of *certiorari* filed in *Hill v. Lockheed Martin Logistics*

Management, Inc., 354 F.3d 277 (4th Cir. 2004) (en banc), *petition for cert. dismissed*, 543 U.S. 1132 (U.S. Jan. 25, 2005) (No. 03-1443). The plaintiff petitioner in *Hill* eventually moved to dismiss the petition. Before receiving the motion to withdraw in *Hill*, however, the Court acknowledged the importance of the issue by inviting the Solicitor General to file a brief expressing the views of the United States. *See* 542 U.S. 935 (U.S. June 28, 2004).

Then, earlier this year in *BCI Coca-Cola*, the Court issued a writ of *certiorari* on the same question presented in this petition. After all briefs were filed, and only six days before the Court was scheduled to hear oral argument in the case, the defendant petitioner BCI Coca-Cola moved for dismissal. On April 12, 2007, the Court dismissed BCI Coca-Cola's petition. Thus, the Court was again denied the opportunity to clarify the appropriate standard for employer liability in cases where the discriminatory animus of an intermediate supervisor was a factor in the employer's ultimate decision to impose an adverse employment action.

This petition raises precisely the same question presented in *BCI Coca-Cola* and in *Hill*. The Court should decide—as it has in the past—that the question is ripe (if not long overdue) for resolution. The need for resolution is even stronger now that the Seventh Circuit's reversal of its own precedent on this issue has further exacerbated the circuit split discussed by the Tenth Circuit Court of Appeals in *BCI Coca-Cola*.

II. Supreme Court Clarification is Necessary to Resolve Inter- and Intra-Circuit Confusion.

A. There is a Distinct and Growing Split of Opinion in the Circuit Courts of Appeals as to the Proper Standard for Holding an Employer Liable For an Intermediate Supervisor's Bias.

This Court issued a writ of *certiorari* earlier this year to review *BCI Coca-Cola,* a Tenth Circuit opinion that expressly acknowledged confusion in the circuit courts as to the proper standard for holding an employer liable for an intermediate supervisor's bias. As the Tenth Circuit noted, "[d]espite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision." *BCI Coca-Cola,* 450 F. 3d at 486. This division is even more pronounced today.

The various circuit courts of appeals have called it by different names—including "cat's paw," "rubber stamp," or the "subordinate liability doctrine"—but all have recognized that Title VII provides that an employer can be liable under *some circumstances* for the bias of a supervisory employee who is not formally imbued with the authority to fire a subordinate. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.,* 217 F.3d 46, 55 (1st Cir. 2000); *Rose v. New York City Bd. of Educ.,* 257 F.3d 156, 161-62 (2d Cir. 2001); *Abramson v. William Paterson Coll. of New Jersey,* 260 F.3d 265, 286 (3rd Cir. 2001); *Hill,* 354 F.3d at 288; *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 227 (5th Cir. 2000); *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 354-55 (6th Cir. 1998); *Lust v. Sealy,* 383 F.3d 580, 584

(7th Cir. 2004); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322-23 (8th Cir. 1994); *Bergene v. Salt River Project Agr. Imp. & Power Dist.*, 272 F.3d 1136, 1141-42 (9th Cir. 2001); *BCI Coca-Cola*, 450 F.3d at 483-86; *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1311-12 (D.C. Cir. 1998).

The circuit courts of appeal, however, lack clarity as to *which circumstances* are sufficient to trigger liability in this context. Specifically, decisions between and among the circuit courts differ as to the degree to which a biased intermediate supervisor must contribute to an adverse employment decision before an employer may be held liable. Further aggravating the problem, the various circuit courts have used ambiguous and inconsistent language to describe the appropriate legal standard under which this question should be answered.

The Seventh Circuit's decision in this case further exacerbated the division of opinion among the circuit courts of appeals on this issue. The Seventh Circuit's articulation of a "singular influence" test differs from the standards expressed by the majority of courts because it rejects liability even when a biased intermediate supervisor directly influenced or effectively caused an adverse employment decision. (App. at 22a.) Instead, to hold an employer liable for the acts of even its supervisory employees,[10] the

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[10] This case does not involve the thornier issues of whether and to what extent an employer may be held liable for the discriminatory acts of its non-supervisory employees. Because the intermediate supervisor in this case, Ms. Thompson, was acting within the scope of her actual authority when she withheld exculpatory information about the parking pass

Seventh Circuit requires the "[supervisor to] possess so much influence as to basically be herself the true 'functional[] ...decisionmaker.'" (App. at 22a (citing *Little v. Ill. Dep't of Revenue*, 369 F.3d 1007, 1015 (7th Cir. 2004)).) Only the Fourth Circuit Court of Appeals has adopted a liability standard as strict as that articulated by the Seventh Circuit here; in the Fourth Circuit, the biased intermediate supervisor must take on the persona of th "functional" or "actual" decision-maker before Title VII liability may be imposed in a "cat's paw" case.[11] *See Hill*, 354 F.3d at 291.

Only three years ago, however, the Seventh Circuit had explicitly *rejected* the Fourth Circuit's "actual decision-maker" standard. *See Lust v. Sealy*, 383 F.3d 580, 584 (7th Cir. 2004) ("We are mindful that *Hill v. Lockheed Martin Logistics Management* . . . holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor . . . . *That is not the view of this court.*" (emphasis added)). In *Lust*, the Seventh Circuit opted instead for a "causation" approach, and held that an employer may be found liable under Title VII where

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incident from Ms. Hendricks, the Court need not consider when, if ever, an employer may be held liable for a non-supervisor's bias.

[11] In the Fourth Circuit, an employer can be found liable under Title VII only when the biased intermediate supervisor "possessed such authority as to be viewed as the one principally responsible for the decision or the actual decision-maker for the employer." *Hill*, 354 F.3d at 291. Thus, like the Seventh Circuit below, the Fourth Circuit has determined that an employer may not be held liable for the discriminatory acts of an intermediate supervisor who lacks such paramount authority, *even "when [discriminatory] acts or motivations lead to or influence a tangible employment action."* *Hill*, 354 F.3d at 287 (emphasis added).

the intermediate supervisor's bias was "a cause of [the plaintiff's] injury." *Id.*

The Seventh Circuit's departure below from its own precedent is emblematic of the confusion and inconsistency pervasive in the circuit courts on this issue. Expressly dismissing *Lust* as "doubtful . . . dicta," the Seventh Circuit admitted:

> [O]ur approach to Title VII cases involving an employee's influence over a decision maker has not always been completely clear. Our opinions have sometimes suggested that not only significant influence, but any influence over an employment decision is sufficient to impose Title VII liability on an employer. Many such instances simply involve imprecise language . . . .

(App. at 26a.)

The Seventh Circuit apparently sought to clarify its previous decisions by establishing the new "singular influence/functional decision-maker" standard. In the same opinion, however, the Seventh Circuit left the door wide open to further intra-circuit confusion by implying that this standard might not apply in every circumstance of subordinate bias:

> Even if we were to assume that a lesser degree of influence over an employment decision might trigger Title VII liability in other contexts, such as the context of regularized, formal performance evaluation, we do not think that such an approach can affect the outcome in a case

> like this that concerns an employee's discipline for particular misconduct.

(App. at 27a.)

This kind of confusion is not confined to the Seventh Circuit. Lacking guidance from this Court, lower courts nationwide have used a variety of different theories to describe the appropriate circumstances for holding an employer liable for the bias of an intermediate supervisor. In the Third Circuit, for example, an employer can be found liable if "those exhibiting discriminatory animus influenced or participated in the decision to terminate." *Abramson*, 260 F.3d at 286; *see also Griffin*, 142 F.3d at 1312 ("[E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."); *Stacks*, 27 F.3d at 1323 (holding that an employer may be liable where a biased intermediate supervisor was "closely involved in the decision making process at each step . . . ."). For purposes of this petition, we label this approach the "influence standard."

Other lower courts have applied something akin to the "influence standard" but have used the language of "but-for" causation to describe it. The Sixth Circuit, for example, has held that an employer may be liable when "the supervisor's racial animus was the *cause* of the termination or *somehow influenced* the ultimate decisionmaker." *Christian v. Wal-mart*, 252 F.3d 862, 877 (6th Cir. 2001) (emphasis added). And, although the Fifth Circuit has examined whether the intermediate supervisor "possessed leverage, or exerted influence, over the titular decisionmaker," the court also indicated that the liability analysis hinged on "who actually made the decision, or caused the

decision to be made." *Russell*, 235 F.3d at 227. While there is an obvious intersection between influence and causation, the implications of the overlap are unclear, and courts have reached divergent interpretations of the "influence standard."

Recently, in *BCI Coca-Cola*, the Tenth Circuit compared and contrasted the Fourth Circuit's "actual decision-maker" standard and the Fifth Circuit's "influence standard," and ultimately rejected *both* in favor of a third standard focusing on causation.[12] *BCI Coca-Cola*, 450 F.3d at 487. Under the Tenth Circuit's formulation, an employer may be liable only when a plaintiff can "establish more than mere 'influence' or 'input' in the decision-making process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation[s], or other actions *caused* the adverse employment action." *Id.* (emphasis added). For the purposes of this petition, we label this approach the "causal standard."[13]

The Tenth Circuit in *BCI Coca-Cola* did not believe it was formulating a new standard for liability under Title VII. In fact, the court stated that it was aligning itself with what it perceived to be the rule of the Seventh Circuit. *Id.* ("We find ourselves in agreement with the Seventh Circuit . . . ."). Relying on *Lust*, the Tenth Circuit was not unreasonable in that assessment. In light of the Seventh Circuit's opinion in

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[12] The Fifth Circuit's analysis of "influence" led the Tenth Circuit to believe the Fifth Circuit had eliminated the requirement of causation. *See BCI Coca-Cola*, 450 F.3d at 487.

[13] In substance, the influence and causal standards may ultimately encompass the same fundamental approach; however, linguistic differences have confused the analysis to such an extent that there is no judicial consistency.

this case, however, the *Lust* analysis may no longer be the prevailing law of the Seventh Circuit.

The Ninth Circuit has arguably taken a different approach altogether, finding that an employer may be liable under Title VII whenever a biased intermediate supervisor was involved in the decision to take an adverse employment action. *See Bergene*, 272 F.3d at 1141. Yet, a mere two years later, the Ninth Circuit issued another opinion that appeared to require a causal link between a protected activity and an adverse employment action in order to make out a prima facie case of retaliation under Title VII. *See Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003). This discrepancy in approach further highlights the need for Supreme Court guidance.

Further confusing the landscape, the Eleventh Circuit, while stopping short of explicitly requiring the "actual or functional decision maker" designation, nevertheless requires something more than "influence" or "causation." The Eleventh Circuit has noted the need for "a causal link between the [supervisor's] discriminatory animus and the decision to terminate . . . ," *Llampallas v. Mini-Circuits Lab Inc.*, 163 F.3d 1236, 1248-1249 (11th Cir. 1998), but has also found that causation is not always enough, *see McShane v. Gonzales*, 144 Fed. Appx. 779, 791 (11th Cir. 2005) ("[A]lthough causation may be established . . . the actual decision-maker must have acted in accordance with th[e biased] person's decision, without the actual decision-maker himself evaluating the employee's situation."); *see also Roberts v. Randstad N. Am., Inc.*, 2007 U.S. App. LEXIS 11568 (11th Cir. 2007).

Federal district courts have also noted this confusion. Recognizing the split in the circuits, a

district court in Pennsylvania recently confirmed that "the Third Circuit has adopted a standard toward the more lenient end of the spectrum." *Foroozesh v. Lockheed Martin Operations Support, Inc.*, 2006 U.S. Dist. LEXIS 77179, at *9 (D. Pa. Oct. 10, 2006) (citing *Abramson*, 260 F.3d 265). The district court in *Foroozesh*, however, acknowledged an unpublished Third Circuit opinion in 2004 that appeared to endorse the "actual decision-maker" standard set forth by the Fourth Circuit in *Hill*. *See Foroozesh*, 2006 U.S. Dist. LEXIS 77179, at *9 (referring to *Foster v. New Castle Area Sch. Dist.*, 98 Fed. Appx. 85, 88 (3d Cir. 2004)). Because *Foster* was non-precedential, the district court found that it was bound to follow *Abramson*, but recognized "the conflict between *Foster* and *Abramson*." *Foroozesh*, 2006 U.S. Dist. LEXIS 77179, at *10-*11.

B. Since Dismissal of the BCI Petition, the Issue Has Caused Further Confusion in the Lower Courts.

The issue presented by this petition arises frequently, and the recent dismissal of the *BCI Coca-Cola* petition has sparked continued debate in the lower courts. For example, the First Circuit traditionally has examined whether "discriminatory comments were made by the key decision-maker or those in a position to *influence* the decision-maker." *Santiago-Ramos*, 217 F.3d at 55 (emphasis added) (citations omitted). Since *BCI Coca-Cola*, however, at least one district court in the First Circuit has defined this approach as more akin to the Tenth Circuit's "causal standard" than the Third Circuit's "influence standard." Finding that the circuit courts have applied at least three standards—one that considers "input," one that considers "the actual decisionmaker," and one that reflects a "middle

ground, expressed in *BCI*" that focuses on causation—a district court in Maine concluded that "[t]he First Circuit currently holds with those in the middle ground." *Harding v. Cianbro Corp.*, 2007 U.S. Dist. LEXIS 32850, at *18-*20 (D. Me. May 2, 2007).

While it may be possible to reconcile the varying formulations of the "influence" and "causation" standards employed in a majority of the courts, it is impossible to reconcile either of these approaches with the stringent "actual decision-maker" standard now employed in two of the twelve circuits. The Seventh and Fourth Circuits require that the intermediate supervisor be transformed into the "functional" or "actual" decision-maker in order to establish employer liability. Thus, the circuit split is even more pronounced today than it was a year ago when this Court granted the petition for a writ of *certiorari* in *BCI Coca-Cola*.

C. The Applicable Standard Has Real Life Consequences for Parties, Because Different Standards Lead to Different Results for Similarly-Situated Parties in Different Federal Courts.

Widely varying legal standards for assigning Title VII liability have resulted in similarly-situated parties receiving different treatment in different courts. Mr. Brewer's case is an obvious example. Under the Seventh Circuit's new standard, Mr. Brewer was denied the opportunity to present his case to a jury, despite the court finding legally sufficient evidence that the intermediate supervisor's bias influenced the firing. (App. at 20a-21a.) If the court had applied an "influence" standard to Mr. Brewer's case, it would

have denied the University's summary judgment motion and allowed the case to proceed to trial. Instead, however, the court decided that "it is not enough just to have some minimal amount of influence," and thus dismissed the claim, extinguishing Mr. Brewer's chance to obtain relief. (App. at 21a-22a.) In another court, the Third Circuit, for example, Mr. Brewer would have had at least the *opportunity* to convince a jury that his case had merit.

It is inappropriate that similarly-situated parties are unable to vindicate their federal statutory rights equally across the federal courts. As the Court has previously recognized, there is a significant inter- and intra-circuit split on the appropriate standard for holding an employer liable for a intermediate supervisor's bias. That split has created confusion and inconsistencies of both policies and practice and situates this matter directly in the domain of this Court's discretionary jurisdiction.

D. The Court Should Correct the Seventh Circuit's Failure to Follow the Express Statutory Language of Title VII.

By disregarding its own precedent and adopting the "singular influence" standard for determining whether an intermediate supervisor's discriminatory acts or omissions caused an adverse employment action, the Seventh Circuit also ignored the unambiguous language of the governing statute.

Section 2000e-2(a) prohibits employers from discriminating against employees "because of . . . race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). This language requires a plaintiff alleging race discrimination in the workplace to demonstrate a

causal link between race and an unlawful employment practice.[14] In 1991, Congress amended Title VII to clarify the causation standard required by Title VII. The 1991 amendment makes it explicit that an employer may be found liable when it or its agents use race as a *factor* in making an employment decision.

Section 42 U.S.C. § 2000e-2(m)(1994) provides (emphasis added):

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

Thus, under Title VII, if a plaintiff proves that the defendant acted "because of" discrimination by showing that unlawful bias was "a motivating factor" in the employment practice at issue, the employer may be held liable.

Where the statutory language is plain and unambiguous, the judicial inquiry must end. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The Seventh Circuit's decision in this case disregarded the statutory directive by requiring that the decision-maker be "wholly dependent on a single source of information" in order to impose liability on the employer. (App. at

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[14] *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (requiring a "causal connection" between the plaintiff's protected activities and the adverse employment action in a Title VII retaliation claim).

23a.) Similarly, the Fourth Circuit in *Hill v. Lockheed Martin* held that the supervisory employee must be the "actual decision-maker" to create liability for the employer. *Hill,* 354 F.3d at 291. These decisions conflict with the explicit language of Title VII, ignoring the language of "motivating factor" and avoiding any discussion of causation.

III. A Consistent Legal Theory Would Aid In Enforcement of Title VII and Guide Employers in Designing Anti-Discrimination Policies.

The question presented in this petition implicates the very core of Title VII—the text and the principles underlying the enactment of the 1964 statute and its 1991 Amendment—namely, to forbid consideration of race, sex, religion, color, or national origin as a factor in employment decisions. A decision in this case will determine the future scope and effectiveness of Title VII.

The existence of multiple standards, even within a circuit, prompts confusion not only in the courts, but for employers seeking to design policies to combat discrimination in the workplace and for employees seeking to understand and vindicate their rights.

Many, if not most, employers use multi-layered personnel processes that involve several different supervisors or officials making decisions about disciplinary actions or dismissals. In these complex structures, employers frequently separate the decision-making function from the investigation and reporting functions. Today, a national company with offices in Illinois, New Jersey, and Colorado, for example, has no uniform guiding principle to help it design anti-discrimination policies for its various offices. What is

considered consistent with Title VII in one jurisdiction may violate the statute in another. These employers need a consistent theory to guide them in protecting employees, training supervisors, designing anti-discrimination policies, conducting investigations, and complying with federal law.

Similarly, employees need this important clarification so they may understand their basic rights. As discussed above, today an employee in New Jersey is much more likely to get to a jury trial than an employee in Illinois on significantly similar facts. And the fact that several federal circuit courts of appeal apply inconsistent standards within their own borders makes the need for Supreme Court resolution of the issue even more critical.

This Court has already recognized the need to intervene by twice taking steps to resolve cases that presented the same issue. Yet, unfortunately, as evidenced by the Seventh Circuit's opinion in this very case, the circuit courts are becoming more split on this key issue. Petitioner respectfully requests that the Court seize the opportunity presented by this petition to decide once and for all the appropriate standard for holding an employer liable when an intermediate supervisor's bias contributes to an adverse employment action.

CONCLUSION

For the above reasons, Petitioner respectfully requests that his petition for a writ of *certiorari* be granted.

Respectfully submitted this 19th day of June, 2007.

Michael Foreman
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER
LAW
1401 New York Ave. NW
Suite 400
Washington, DC 20005
(202) 662-8600
Counsel for Petitioner

Appendix A

APPENDIX A - DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED ON MARCH 21, 2007

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

Lonnell BREWER, Plaintiff-Appellant,
v.
BOARD OF TRUSTEES OF the UNIVERSITY OF ILLINOIS, Defendant-Appellee.
No. 06-1259.

Argued Sept. 21, 2006.
Decided March 21, 2007.

Joanna C. Fryer (argued), Chicago, IL, for Plaintiff-Appellant.
James C. Kearns, Monica Hersh Khetarpal Sholar (argued), Heyl, Royster, Voelker & Allen, Urbana, IL, for Defendant-Appellee.

Before BAUER, CUDAHY, and WOOD, Circuit Judges.
CUDAHY, Circuit Judge.

This case concerns the corrupt, Machiavellian world of permit parking at the University of Illinois's Urbana-Champaign campus, and the ill fortune of a student who became involved in it. Lonnell Brewer claims that he was fired from his student job at a University personnel office and subsequently booted from a master's degree program because one of his

supervisors at the personnel office, Kerrin Thompson, failed to tell *her* supervisor that she had given Brewer permission to park his car in a certain University parking lot. Thompson kept silent about this, says Brewer, because Brewer is black and she wanted him fired, putting the University in violation of Titles VI and VII of the Civil Rights Act of 1964. The University admits that Brewer was fired for modifying a University parking tag, but claims that his termination from the master's program was only for his poor academic performance and denies that any decision attributable to it was motivated by race. The district court granted the University summary judgment on Brewer's claims. Brewer appeals. We affirm.

I. Background

We begin by recounting Lonnell Brewer's strange tale of intrigue; because he appeals from a grant of summary judgment we resolve all conflicts in the evidence and draw all permissible inferences in his favor. *Berger v. AXA Network LLC*, 459 F.3d 804, 806 (7th Cir.2006). Brewer's career at the University of Illinois at Urbana-Champaign started well enough. Already armed with a bachelor's degree in psychology, he enrolled in the University's psychology Ph. D. program in the fall of 1995. After completing two years of study he decided not to pursue the Ph. D. and instead to transfer to the master's degree program at the University's Institute of Labor and Industrial Relations (ILIR). Upon transferring he received merit-

based financial aid and also an ILIR research assistantship under which he would receive a stipend for working ten hours each week at the University Personnel Services Office (PSO).

Brewer alleges a complicated trail of causation that leads back and forth between actors and events at these two institutions. Consequently, our tale must jump back and forth between the PSO and the ILIR to follow his story.

A. Brewer's Work at the PSO in Early Fall 1997

Brewer claims that his troubles began at the PSO with one of his supervisors, Kerrin Thompson, assistant to PSO Director Denise Hendricks (both of whom are white). In early September, on the first day of his research assistantship, Brewer met with Thompson and learned that he would be working on part of a large survey. They discussed the requirements of the assistantship, among them the time and dress expected (flexible hours to allow Brewer to schedule interviews with prospective employers; casual dress, with jeans specifically acceptable). Thompson also explained where Brewer could park when working at the PSO, a topic of eventual great importance. Brewer says that Thompson gave him a temporary University parking tag and kind of gestured you can park here (indicating), park there (indicating), and, you know, I was in her office so I wasn't really oriented as to where that meant, but basically she

pointed to all the different spots in the building, so it was almost a 360 degree kind of gesture, indicating to me that I could pretty much park anywhere at the PSO as long as I had my tag on my mirror. (Brewer Dep. at 66.)

Trouble began to develop between Thompson and Brewer on October 8 or 9, 1997, ostensibly when Thompson learned that Brewer's fiancee was white. From that point on, Thompson's "posture became noticeably and increasingly hostile" (Brewer Dep. Ex. 14 at 5), and she did things to embarrass Brewer and make working at the PSO difficult for him. For instance, she would sometimes go around the office asking if anyone knew where Brewer was, even on days when he was not supposed to be in the office, and she refused to let Brewer work off-site to take advantage of software for the blind and dyslexic that reads words aloud.[1]

On October 13 or 14, Brewer received a warning from Elyne Cole, the PSO's Director of Employment

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[1] Brewer suffers from a learning disability, but the record does not contain evidence of its nature. The complaint states that "[p]sychologists have concluded that Plaintiff's symptoms are consistent with DSMIII-R diagnosis of Specific Developmental Disorder-Not Otherwise Specified." (Compl.¶ 36.) Given the nature of the accommodations Brewer sometimes sought, we suspect that it may be similar to dyslexia, but we are not sure.

Services (who is black),[2] about a "person who you think is your friend" who was in fact an enemy. (Brewer Dep. Ex. 14 at 5.) Brewer pressed for more information. While she was reluctant to talk at first, Cole eventually revealed that Thompson was a racist and that Cole had overheard Thompson saying disparaging things about Brewer, such as that he lacked urgency about his work. Cole warned Brewer that Thompson had a lot of influence with Hendricks and urged Brewer to start recording the times he was present and working at the PSO, even though there was no formal requirement that he do so. Brewer followed her advice, having a secretary verify and sign his record.[3]

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[2] While Brewer was the only black student to ever hold the ILIR research assistantship at the PSO, the PSO did, at the time, have numerous other black employees.

[3] In fact, Brewer did far more: he began to compose a lengthy journal detailing events at the PSO and ILIR that he thought indicative of racial animus against him. (Brewer Dep. at 91.) The narrative was reconstructed after the fact using notes and emails, and entries were not necessarily written contemporaneously with the events they reported. (Brewer Dep. at 93-94.) Brewer offered this journal into the record and frequently cites to it. (*See* Brewer Dep. Ex. 14.) Brewer affirmed that the journal is a "true and accurate account of the events that occurred at or near the times referenced therein," but given the irregular mode of its composition there might be an embedded hearsay problem. *See* Fed.R.Evid. 803(5) (permitting into evidence a written record "made or adopted by the witness when the matter was fresh in the witness's memory"). At any rate, the University does not object to Brewer's use of the document and we therefore consider it as though it were testimony.

Appendix A

B. Brewer's Studies at the ILIR in Early Fall 1999

Meanwhile, Brewer was beginning a very ambitious program of study at the ILIR. Normally, students would complete the ILIR program in three semesters; Brewer hoped to complete the program more quickly through a combination of an unusually demanding schedule, a waiver of one requirement and summer courses. A student could not enroll in more than four courses per semester without an advisor's permission, but Brewer persuaded his advisor, Prof. Michael LeRoy, to permit him to enroll in five courses for the Fall 1997 semester. Another one of Brewer's professors, Wallace Hendricks (husband to PSO Director Denise Hendricks), urged Brewer not to do this, saying that such a hectic schedule would not allow Brewer to take full advantage of the program, especially in light of the time he was scheduled to work at the PSO.

Brewer's research assistantship at the PSO was awarded and sponsored by the ILIR, and throughout the fall semester there were signs that the ILIR faculty was aware of Brewer's performance in the assistantship, and more specifically Thompson's opinion of it. For instance, Professor Wallace Hendricks once told Brewer that Thompson thought Brewer had missed a day of work and that he should

stop wearing jeans at work.

C. Blown PSO Deadline in Late Fall 1997

Prof. Wallace Hendricks's warning against the five-course schedule turned out to be well-grounded. When the Fall 1997 semester neared its end, the combination of five classes, the PSO assistantship and additional extracurricular activity worked Brewer to the bone, and the time constraints he faced proved too demanding. When asked early in the semester to pick a deadline for his portion of the survey at the PSO, Brewer had chosen the final Friday before finals week. He had thought that by completing the project on that day he would be free to devote himself to studying before and during his finals. But the deadline came and his project was not quite ready. After speaking with his project supervisor, Judy Baker, he agreed to complete the project over the weekend and submit it on Monday.

That same Friday, Thompson and Hendricks separately spoke to Brewer about the missed deadline and what they believed were other performance problems. Thompson told Brewer that he lacked "initiative and motivation" and had not been working enough; Brewer argued with her, showing her his unofficial timesheet and saying he missed the deadline because she did not let him use the off-site dyslexia software. (Brewer Dep. Ex 14 at 6-7.) Later, Brewer met with Hendricks, who said that she had talked with

ILIR Director Peter Feuille and was considering terminating Brewer's assistantship with Feuille's support. She considered the blown deadline serious and further reported that Thompson thought Brewer wasn't working his ten hours a week. Brewer offered to show Hendricks his unofficial timesheet but she declined to view it. She stated that she had been excited to have a minority working at the PSO, but was "disappointed [by the blown deadline] because the first thing I thought when Kerrin [Thompson] told me was what a waste." (Brewer Dep. Ex. 14 at 7.)

On Monday, Brewer submitted his portion of the survey to Baker as arranged. When Hendricks saw the project she was pleased with it and decided to keep Brewer on, saying that she had suspected the project was in worse shape than it was and acted hastily.

D. ILIR Finals in Late Fall 1997

Brewer's end-of-semester time crunch was not yet over; indeed, Brewer had been forced to split his focus between studying and the PSO situation in the days before finals. He had to ask Prof. LeRoy for extensions on take-home papers in two different classes; LeRoy assigned penalties on each paper. Brewer also received an extension without penalty in a class under Professor Joseph Martoccio. All of Brewer's final exam grades were quite poor (for instance, he wrote the lowest-graded exam in Prof. Wallace Hendricks's Quantitative Methods course).

His overall semester grades took a nosedive.

But inadequate preparation time wasn't Brewer's only problem; he received word that his professors graded him down because of his troubles at the PSO. One of Prof. Wallace Hendricks's TA's informed Brewer that Hendricks had "insisted on giving [Brewer] a C+ because of what happened" there (Brewer Dep. Ex. 14 at 11), and Prof. LeRoy told Brewer that his late-penalty was more severe than normal in part because "your performance at the PSO has somewhat called into question your credibility" (Brewer Dep. Ex. 14 at 9).

Brewer finished the Fall 1997 semester with a GPA of 2.866. The minimum cumulative GPA expected of ILIR students is 3.0. If a person goes two semesters with a cumulative GPA of less than 3.0, they are generally dropped from the master's program. In January, Prof. LeRoy, acting in his capacity as head of the On-Campus Committee, wrote to inform Brewer of this danger and recommend that he take a light, three-course schedule next semester to improve his GPA. On January 23, 1998, Feuille wrote Brewer to express his disappointment at Brewer's failure to complete the PSO project on time and warn him that his work and academic trouble were both caused by his excessive class load.

D. Parking Scandal and Firing from the PSO in Spring 1998

Appendix A

Brewer took only three classes in Spring 1998. He still suffered at the PSO under Thompson, but he experienced no major work-quality crises like the blown deadline at the end of the Fall 1997 semester.

Nonetheless, Brewer's job was jeopardized by a strange parking scandal. One day in early April, possibly April 13, Brewer's car was ticketed because the temporary parking tag Thompson had given him at the start of the Fall semester broke and fell off his rearview mirror. The tag was hand-written and purported to grant permission to park in either the E7 (PSO) or the C8 (ILIR) lots. Brewer basically admits that he wrote the C8 lot permission on the tag himself, without anyone's explicit permission to do so.[4] Brewer took the tag to University parking services to have it replaced, but a clerk looked up the PSO's application for the tag and discovered that it contained inaccurate information. Parking services suspected that Brewer was not entitled to park anywhere at all, and issued him another temporary parking tag pending further investigation.

When Brewer arrived at work the next day, he went to speak with Thompson about the parking tag.

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[4] To be more hair-splitting, Brewer admits that he "may" have written "C8" on the tag and that the tag did not say "C8" when Thompson gave it to him. (Brewer Dep. at 66-67.) In his journal, Brewer stated that he wrote "C8" on the tag because Thompson "neglected" to do so. (Brewer Dep. Ex. 14 at 15.)

Appendix A

As soon as he entered her office she announced: "I know what you did." (Brewer Dep. Ex. 14 at 15.) Irate, Thompson explained that Brewer was indeed not supposed to have a parking tag and that he should not have gone to parking services. She said that the PSO "trust[s] me to give parking tags to the type of people that can be trusted" (Brewer Dep. Ex. 14 at 16), and that she had lied on the application to get Brewer a tag. Brewer's indiscretion could cost him his job, as Hendricks had already talked to the ILIR about the incident.

Brewer reminded Thompson that she had told him to park anywhere and a heated argument erupted, during which Thompson became quite upset. She stated that she was "through with you people" and that Brewer was "a smart one." (Brewer Dep. Ex. 14 at 16.) She ordered Brewer to retrieve the troublesome parking tag; when he turned to leave her office she yelled, "I have had it with you nigger, get my tag!" (Brewer Dep. Ex. 14 at 17.)

Some time later, Brewer went to speak with Hendricks. She told him that "I and I alone have decided to terminate your assistantship." (Brewer Dep. Ex. 14 at 18.) Although the parking tag issue did not merit termination in the abstract, Hendricks said the PSO had a "special relationship" with parking services and feared that she would lose "parking flexibility" unless she fired someone. If the "special relationship" fell apart, the PSO would have to pay an additional one thousand dollars a year for the parking it was currently

using. (Brewer Dep. at 77; *id.* Ex. 14 at 18.)

Brewer told Hendricks that Thompson gave him permission to park in the C8 lot. He also said that Thompson could not be trusted to confirm this because she was a racist and wanted him fired, relating the things Thompson had said in their meeting. Hendricks replied that she didn't know whether Thompson had said such things to Brewer, but that at any rate it was an issue solely between Thompson and Brewer. Because Brewer admitted to taking the altered tag to parking services, he should be fired.

Because it will prove important, we also set out Hendricks's testimony concerning the parking scandal. Hendricks claimed she fired Brewer for "adulterating" the parking tag. (Hendricks Dep. at 35.) Thompson told her parking services was upset because Brewer wrote "C8" on the tag, and she decided to fire Brewer after inspecting the tag and verifying the addition for herself. She did not talk to Brewer before reaching her decision and in fact never talked to him about the parking fiasco at all. She testified that if Brewer had told her that Thompson told him to add "C8" to the tag, that "would have led to further conversation." (*Id.* at 49.) If Brewer had told her about Thompson's racist language, she would have taken that very seriously. When asked whether such language would give her reason to distrust Thompson with regard to Brewer, she replied, "I think I would have very great difficulty in answering that question. It has too many components to it, and that would be one that I would

have to deal with the facts of the situation." (*Id.* at 66.)

Brewer was fired from the PSO effective April 21, 1998. The ILIR terminated his research assistantship and the financial aid that went with it that same day.

E. Termination from the ILIR Program in Spring 1998

Although Brewer limited himself to three classes in the Spring semester, his cumulative GPA at the end of the semester was 2.959, still short of the required 3.0. ILIR policy dictates that students with a cumulative GPA of less than 3.0 after two semesters should be dropped from the program absent "extraordinarily compelling circumstances." (Brewer Dep. Ex. 13 at 1.) ILIR Director Feuille applied the rule and gave Brewer the boot. Prof. LeRoy later told Brewer that the On-Campus committee recommended to Feuille that Brewer be retained because his poor grades were the result of his heavy workload rather than a reflection of poor ability; however, Director Feuille rejected its recommendation "based on the incident at the PSO." (Brewer Dep. Ex. 14 at 23.)

F. Legal Action

Brewer then brought the present action against the University, arguing, among other things, that he was fired from the PSO because of his race, in violation

of Title VII of the Civil Rights Act of 1964, that he was dropped from the ILIR program because of his race, in violation of Title VI, and that PSO employees said unfavorable things about him to ILIR faculty in retaliation for his complaints about Thompson's racism, in violation of Title VII. The University moved for summary judgment. In response, Brewer argued both that the evidence established a prima facie case for all three of his claims under the burden-shifting *McDonnell Douglas* framework, and that even without the benefit of *McDonnell-Douglas* a jury could still reasonably believe that his firing and termination from the master's program had been racially motivated. He noted that Hendricks, Feuille and others frequently made reference to his race, which he claimed showed that the University held black students and employees to higher standards than others. Alternately, he argued, a jury could conclude that Thompson's failure to reveal that she told Brewer to park anywhere was responsible for everything; her silence got Brewer fired and the firing got Brewer dropped from the master's program. The district court granted summary judgment to the University. Brewer now appeals.

II. Discussion

We review the district court's grant of summary judgment *de novo*. *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 936 (7th Cir.2007). Summary judgment is appropriate where the evidence "show[s] that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Kampmier*, 472 F.3d at 936. There is no genuine issue of material fact when no reasonable jury could find in favor of the nonmoving party. *Paz v. Wauconda Healthcare & Rehab. Ctr., LLC*, 464 F.3d 659, 664 (7th Cir.2006), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Yindee v. CCH Inc.*, 458 F.3d 599, 601 (7th Cir.2006).

A. Title VII: Firing from the Personnel Services Office

First, Brewer claims that his firing from the PSO violated Title VII of the Civil Rights Act of 1964. Among other things, Title VII makes it unlawful for "an employer ... to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Acting "because of race" means acting with a racially discriminatory reason in mind. *Jordan v. City of Gary*, 396 F.3d 825, 832 (7th Cir.2005); *Hildebrandt v. Ill. Dept. of Natural Resources*, 347 F.3d 1014, 1029 (7th Cir.2003).

A plaintiff can avoid summary judgment in two ways: the burden-shifting method first established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), often called the "indirect" method of proof, or the conventional method of presenting a "convincing mosaic" of direct

or circumstantial evidence that could permit a reasonable jury to conclude that the employer acted with discriminatory intent, often called the "direct" method of proof.[5] *Jordan*, 396 F.3d at 831-33. Brewer seeks to proceed using both methods of proof.

1. Indirect Method of Proof

Under the indirect method of proof, the defendant seeking summary judgment must offer a legitimate, nondiscriminatory reason for its actions once the plaintiff makes out a prima facie case of discrimination. *Burks v. Wis. Dept. of Transp.*, 464 F.3d 744, 750-51 (7th Cir.2006). To make out a prima facie case, Brewer must show that (1) he was a member of a protected class, (2) he was qualified for his position at the PSO and met the PSO's legitimate expectations, (3) he suffered an adverse employment action (that is, an unfavorable material change in the terms, conditions, or privileges of his employment), and (4) similarly-situated non-class members were treated more favorably than he. *Id.* If a prima facie case has been shown and the defendant offers a nondiscriminatory

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[5] While the terms "direct" and "indirect" are often used without trouble, they sometimes cause confusion when litigants believe that the "direct" method of proof permits consideration only of direct evidence-that is, testimony concerning an employer's open admission of discriminatory intent-and not circumstantial evidence. *See, e.g., Rogers v. City of Chicago*, 320 F.3d 748, 754 (7th Cir.2003).

reason for its actions, the burden shifts back to the plaintiff to demonstrate that the suggested reason is mere pretext for discrimination. *Id.*

In the present case, it doesn't matter whether Brewer has presented a prima facie case; the University has offered a legitimate, nondiscriminatory reason for his firing (the parking scandal), and Brewer's argument that this reason was not in fact nondiscriminatory will be addressed below in connection with the direct method of proof. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-11, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (holding that once a defendant comes forward with a nondiscriminatory reason for its actions, the *McDonnell-Douglas* framework "simply drops out of the picture"); *Nawrot v. CPC Intern.*, 277 F.3d 896, 906 (7th Cir.2002); *King v. Preferred Technical Group*, 166 F.3d 887, 893 (7th Cir.1999). Even if the prima facie case were important, Brewer makes no effort to show that any other employee stood accused of anything similar to missing an important deadline or committing a parking indiscretion, and consequently has failed to show that he was treated worse than a similarly situated employee who was not black. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404-07 (7th Cir.2007); *Hull v. Stoughton Trailers, LLC*, 445 F.3d 949, 952 (7th Cir.2006).[6]

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[6] Brewer also argues for the first time on appeal that he was treated worse than a similarly situated non-black person because he was "replaced" by a non-black person. *See Steinhauer v.*

Appendix A

2. Direct Method of Proof

Because Brewer does not succeed under the indirect method of proof, we move on to the direct. Brewer's first argument here is that Hendricks subjected him to heightened scrutiny because he was black, observing that Hendricks frequently mentioned Brewer's race and in particular often noted that he was the first African-American male to hold the ILIR research assistantship at the PSO. But while superficially neutral comments about an employee's race might suggest racial animus in an incriminating context, *see, e.g., Phaup v. Pepsi-Cola Gen. Bottlers, Inc.*, 761 F.Supp. 555, 564 (N.D.Ill.1991), Brewer offers no reason to think Hendricks's comments were anything but positive. To the contrary, Hendricks said she "was excited to have a minority" in the assistantship (Brewer Dep. Ex. 14 at 2) and wanted to see minorities succeed (*Id.* at 7, 10). Brewer also claims that a later remark by Feuille that Brewer's poor performance had "ruined it for everyone else" indicates that Hendricks had

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DeGolier, 359 F.3d 481, 484 (7th Cir.2004), *citing Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 454 (7th Cir.1999); *Leffel v. Valley Fin. Servs.*, 113 F.3d 787, 793 (7th Cir.1997). The argument is forfeited. *Jarrard v. CDI Telecommunications, Inc.*, 408 F.3d 905, 916 (7th Cir.2005). Even if it were not, it is doubtful that Brewer was "replaced" for purposes of a prima facie case, since no one took over Brewer's job before his assistantship would have expired anyway in the normal course of events.

decided to never again hire a black research assistant, but it would be pure speculation to conclude that the comment refers to race. (Brewer Dep. at 89.) Feuille was concerned that poor student performance might lead the PSO to discontinue the research assistantship program (as it eventually did, though apparently not because of Brewer). No jury could conclude that Hendricks was herself biased against Brewer because of his race.

This leaves Brewer's argument that the University violated Title VII because Thompson, acting for racial reasons, got Brewer fired by failing to reveal to Hendricks that she told Brewer he could park anywhere. Thompson's remarks to Brewer would clearly permit a jury to conclude that she acted as she did for racial reasons. *See, e.g., Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 491 (7th Cir.2007) (distinguishing "stray remarks" from relevant racial comments). Thompson did not "discharge" Brewer, so no liability could arise on that score. 42 U.S.C. § 2000e-2(a)(1). But Title VII also prohibits "discriminat[ing] against any individual with respect to his terms, conditions, or privileges of employment." *Id.* Courts limit that language to reach only material, sufficiently important alterations of the employment relationship (often referred to as "adverse employment actions"). *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir.2006); *see also O'Neal v. City of Chicago*, 392 F.3d 909, 911 (7th Cir.2004) (listing types of "adverse employment actions" that can give rise to a Title VII violation).

In and of itself, whether other employees speak ill or spread rumor about one is not a very important aspect of one's employment, so long as such behavior is not severe or pervasive. *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 731 (7th Cir.2004); *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 466 (7th Cir.2002); *Smart v. Ball State Univ.*, 89 F.3d 437, 442 (7th Cir.1996). But in the right context-a performance review, for instance-what one employee says or doesn't say about another will control an employee's wages and chances for promotion, or may even get an employee fired. Consequently, we have held that where an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment nonetheless uses her "singular influence" over an employee who does have such power to harm the plaintiff for racial reasons, the actions of the employee without formal authority are imputed to the employer and the employer is in violation of Title VII. *Rozskowiak v. Village of Arlington Heights*, 415 F.3d 608, 613 (7th Cir.2005), *citing Hunt v. City of Markham, Ill.*, 219 F.3d 649, 653 (7th Cir.2000). In some situations, the influence can be exercised by supplying misinformation or failing to provide relevant information to the person making the employment decision. *See, e.g., David v. Caterpillar, Inc.*, 324 F.3d 851, 861 (7th Cir.2003); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir.1997).

In the present case, a jury could conclude that Thompson withheld relevant information from Hendricks, and as a result had some influence over

Hendricks's decision to fire Brewer. A jury would have trouble doing so if it chose to believe Brewer's account of the parking scandal. Thompson could have told Hendricks that Brewer's modification of the parking tag was an honest mistake, but according to Brewer Hendricks did not fire him because he was dishonest or broke the parking rules. Indeed, the PSO itself was cheating University parking services out of a thousand dollars a year. Hendricks fired Brewer simply because someone had to be fired to keep parking services from looking too closely at the PSO's tag applications. Brewer was the natural choice: the incriminating parking tag was his, and as a student research assistant the PSO would have to replace him in a few months anyway. Given the cynical but non-racial motive Brewer ascribes to Hendricks it was irrelevant where Thompson told Brewer to park, and Thompson's failure to reveal the facts did not affect Hendricks's decision.

Ironically, the jury could find Thompson affected the decision if it believed *Hendricks's* version of events. Hendricks claims she fired Brewer for dishonestly altering his parking tag and suggested that she might have changed her mind if the alteration were an honest mistake. The jury could believe that the alteration was an honest mistake, that Thompson knew it and that she failed to tell Hendricks. If that is the case, Thompson had influence over Brewer's firing; if she had talked, it might not have happened.

But it is not enough just to have some minimal

amount of influence; did Thompson have the "singular influence" required by *Rozskowiak?* For a nominal non-decision-maker's influence to put an employer in violation of Title VII, the employee must possess so much influence as to basically be herself the true "functional[ ] ... decision-maker." *Little v. Ill. Dept. of Revenue,* 369 F.3d 1007, 1015 (7th Cir.2004). The nominal decision-maker must be nothing more than the functional decision-maker's "cat's paw." *Shager v. Upjohn Co.,* 913 F.2d 398, 403 (7th Cir.1990). A good example of such a degree of influence (and one which will offer a revealing comparison to the present case) is where the party nominally responsible for a decision is, by virtue of her role in the company, totally dependent on another employee to supply the information on which to base that decision. In such a case the employee that selects, colors and supplies the information has such power over the nominal decision maker that she is in fact the true, functional decision maker. Mere "paper review" of the informer's recommendation will not shield the employer from liability if her recommendation is racially motivated. *Gusman v. Unisys Corp.,* 986 F.2d 1146, 1147 (7th Cir.1993); *see also David,* 324 F.3d at 861 (holding that liability can be based on the bias of employees who have the duty to recommend other employees for promotion, where the decision maker said he "received the necessary information" for decisions from those recommending employees); *Thorn v. Sundstrand Aerospace Corp.,* 207 F.3d 383, 387 (7th Cir.2000) (describing "perfunctory" review by an internal committee that asked limited questions of the

recommender and suggesting that the committee was "a liability shield invented by lawyers"); *Shager*, 913 F.2d at 403 (describing "brief, perfunctory" deliberations of a committee "apt to defer to the judgment" of an employee's immediate supervisor in making employment decisions).

By contrast, where a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker. *Byrd v. Ill. Dept. of Public Health*, 423 F.3d 696, 708 (7th Cir.2005); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (1997). It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source. For instance, we have frequently dealt with employees that claim they were framed for misconduct by a racist coworker or superior, which caused the employee in question to be fired. Even though the employer in such situations must often decide what to do based on nothing more than the conflicting stories of two different employees, the employer will not be liable for the racism of the alleged frame-up artist so long as it independently considers both stories. *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 730 (7th Cir.2004); *Alexander v. Wis. Dept. of Health and Family Servs.*, 263 F.3d 673, 685-86 (7th Cir.2001); *Eiland v. Trinity Hosp.*,

150 F.3d 747, 753 (7th Cir.1998); *Willis,* 118 F.3d at 547-48.

In *Eiland,* for instance, the plaintiff nurse was fired after a staff physician reported that she injected a pregnant woman with a measles-mumps-rubella vaccine without following proper procedure. The plaintiff sued, claiming that the staff physician had racial animus against her and had made the report to get her fired. We held that even assuming the staff physician had made the story up, there had still been no violation of Title VII. The supervisor who fired her acted only after reading the staff physician's incident report, speaking with another supervisor and confronting the plaintiff herself with the allegations. The supervisor had thus "acted independently and only after she evaluated the circumstances, including [the plaintiff's] version." *Id.* at 753.

We confronted a similar situation in *Willis,* where the plaintiff Willis was fired after tardily processed invoices were repeatedly found in her files. 118 F.3d at 544-45. Willis claimed that her supervisor, Conklin, bore racial animus against her and had planted the invoices to get her fired. Conklin's supervisor, Mizen, sent Willis a memorandum requesting more detail or other information supporting her claims against Conklin. Willis did not provide any. She was reprimanded and eventually fired. *Id.* Willis sued, claiming that Conklin had violated Title VII by planting the files. We held that no rational jury could have found that Mizen acted as Conklin's "cat's

paw" or "rubber stamp." Mizen's "proactive involvement" in investigating the circumstances surrounding the invoices, including a "serious[ ]" investigation of Willis's allegations, were sufficient to absolve the employer of liability for Conklin's frame-up. *Id.* at 547-48.

Brewer's case is not distinguishable from these cases in which an independent investigation absolves the employer of liability. Though Thompson, as Hendricks's assistant, might have effective control over some of Hendricks's decisions, the decision to fire Brewer was not one of them. Hendricks listened to the information Thompson relayed to her but did not simply rely on it. Instead, she examined the parking tag herself and confirmed that it had been altered. True, Hendricks did not investigate the possibility that Thompson was holding back relevant information, but according to Hendricks, and unlike in *Willis*, Brewer never claimed that Thompson was holding anything back. No one has suggested that Brewer was unable to bring such a claim to Hendricks's attention, and until he did so Hendricks had no reason to suspect that there were additional relevant facts that she had not investigated. *Cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (holding that an employer is not liable for an employee's sexual harassment where the plaintiff failed to take advantage of corrective opportunities, such as a complaint procedure); *Jackson v. County of Racine*, 474 F.3d 493, 502 (7th Cir.2007); *Erickson v. Wis. Dept. of Corr.*, 469 F.3d 600, 604-09 (7th Cir.2006). Hendricks therefore

conducted an independent investigation that absolved the University of liability for any deception on Thompson's part.

Although Brewer has not brought the relevant cases to our attention, our approach to Title VII cases involving an employee's influence over a decision maker has not always been completely clear. Our opinions have sometimes suggested that not only significant influence, but any influence over an employment decision is sufficient to impose Title VII liability on an employer. Many such instances simply involve imprecise language. *See, e.g., Sun v. Bd. of Trustees of Univ. of Ill.*, 473 F.3d 799, 813-14 (7th Cir.2007) (holding that a recommendation can "taint" multiple levels of administrative review); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir.1994) (holding that a subordinate's discriminatory animus must "affect[ ]" the decision). But a few instances clearly involve more than loose language. For instance, *Lust v. Sealy* openly rejected the view that an employee's limited "influence" is "not enough to impute the discriminatory motives of the subordinate to the supervisor." 383 F.3d 580, 584 (7th Cir.2004). "If [the decision-maker] would not have turned down [the plaintiff] for the promotion had it not been for [a nominal subordinate's] recommendation ... then [the nominal subordinate's] sexism was a cause of [the plaintiff's] injury, whether or not [the decision-maker] could reasonably be thought a mere cat's paw." *Id.*

These dicta are doubtful. They are at odds with

numerous cases in which we have upheld summary judgment despite a racist employee's potential but slight influence over an employment decision. *See, e.g., Rozskowiak,* 415 F.3d at 613 (upholding summary judgment where an allegedly biased employee was on a seven-member committee that recommended the plaintiff's firing); *Cerutti v. BASF Corp.,* 349 F.3d 1055, 1063 (7th Cir.2003) (upholding summary judgment where two allegedly biased employees were members of an employee selection committee); *Maarouf v. Walker Mfg. Co.,* 210 F.3d 750, 754-55 (7th Cir.2000) (upholding summary judgment where a biased manager was one of several managers reporting unfavorably on the plaintiff's work).

Even if we were to assume that a lesser degree of influence over an employment decision might trigger Title VII liability in other contexts, such as the context of a regularized, formal performance evaluation, we do not think that such an approach can affect the outcome in a case like this that concerns an employee's discipline for particular misconduct. The line of cases addressing this particular situation is univocal, and indicates that even where a biased employee may have leveled false charges of misconduct against the plaintiff, the employer does not face Title VII liability so long as the decision maker independently investigates the claims before acting.

Requiring only an independent investigation of misconduct charges makes good sense in light of the practical realities that an employer often faces when

addressing such charges. Title VII is informed by traditional principles of agency law, *see* 42 U.S.C. § 2000e-2(a)(1), *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 754-55, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 791-92, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), but those principles should be applied in light of the practical reasons for imposing liability on employers. *Faragher,* 524 U.S. at 797, 118 S.Ct. 2275; *see also Burlington Indus.,* 524 U.S. at 755, 118 S.Ct. 2257 (holding that "common-law principles may not be transferable in all their particulars to Title VII"). Title VII's primary objective is "not to provide redress but [to] avoid harm" by giving employers an incentive to control their employees. *Erickson v. Wis. Dept. of Corr.,* 469 F.3d 600, 605-06 (7th Cir.2006); *see also Burlington Indus.,* 524 U.S. at 764, 118 S.Ct. 2257 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."). Consequently, employers should be liable for their employees' racism only in "the general class of cases in which [an employer] has the practical ability to head off injury to [its] employee's ... victim." *Shager,* 913 F.2d at 405. Imposing liability for employee wrongs that an employer could not practically prevent (that is, could prevent only with prohibitive expense or through unreasonable efforts) would not induce employers to impose additional controls on its employees and would therefore not be effective to avoid any harm.

In cases like the present one, there is probably no practical step an employer can take beyond

independently investigating the misconduct charges that will reduce the chances of an employee's racism influencing its behavior. When an employee is accused of wrongdoing by another, the key evidence for an employer (and the courts) to consider will often be the mere say-so of two employees, one of whom claims the other is a lying racist. Such a case is a model "swearing contest." The best way the courts can find to deal with such puzzles is to empanel a jury and hope for the best; it might be too demanding to expect an employer to do more than have an employee conduct a fair-minded, independent investigation into the available evidence and then make a decision in good faith.

Title VII's agency principles do not counsel in favor of imputing Thompson's acts to the University where the University has investigated the claim that Brewer dishonestly modified the parking tag, including all arguments Brewer made to the University that his mistake was innocent (according to Hendricks's account, he made none), and has otherwise taken all reasonable steps to prevent Thompson's actions from affecting Brewer's employment. A reasonable jury could not find that the University intentionally discriminated against Brewer in firing him from the PSO, and summary judgment on this claim was appropriate.

B. Title VI: Termination from the ILIR Master's Degree Program

Second, Brewer claims that he was dropped from the ILIR master's program because of his race, in violation of Title VI of the Civil Rights Act of 1964. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The master's program was receiving federal money, so to avoid summary judgment Brewer must present evidence sufficient to permit a reasonable jury to conclude that the University dropped him for a racial reason. *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (holding that Title VI prohibits only intentional discrimination); *City of Chicago v. Lindley*, 66 F.3d 819, 828 (7th Cir.1995) (same). Brewer seeks to use both the indirect and direct methods of proof.

1. Indirect Method of Proof

Under the indirect method, Brewer contends that the circumstances surrounding his termination constitute a prima facie case that Director Feuille acted for racial reasons. The elements of a prima facie case are the same under both Title VI and VII. *Paul v. Theda Medical Ctr., Inc.*, 465 F.3d 790, 794 (7th Cir.2006); *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir.1998). Adjusting terms for the educational context, that means membership in a protected class, meeting the school's

legitimate educational expectations, an adverse educational action and worse treatment than that of similarly situated students not in the protected class. *Byrant v. Independent Sch. Dist. No. I-38 of Garvin County, OK*, 334 F.3d 928, 930 (10th Cir.2003); *Hankins v. Temple Univ. (Health Sciences Ctr.)*, 829 F.2d 437, 440-43 (3d Cir.1987).

Brewer's case again falls apart because of a failure to locate a similarly situated individual. Brewer had a cumulative GPA of 2.959 after two semesters, meaning that he had to be dropped from the program absent extraordinarily compelling circumstances. Most of the faculty could not remember any time when a student with numbers like Brewer's was retained in the program. Director Feuille vaguely remembered a time that an Asian-American student with a below-3.0 GPA was retained because of extraordinarily compelling circumstances, namely that her GPA was caused by her reliance on the "advice of a faculty member about, all right, if you do A and B, then you'll be okay. Well, she did A and B. I don't remember what A and B were." (Feuille Dep. at 33.) Brewer claims that he is similarly situated to this student because his GPA was caused by Professor LeRoy's permission to take five courses. But although LeRoy was Brewer's "advisor," he did not advise Brewer to take five courses. No one did; on the contrary, everyone warned him that taking five courses was unusual and dangerous. The distinction is obviously relevant to the decision whether to permit Brewer to remain in the program. *Hull*, 445 F.3d at 952.

In one case, the student is misled and unfairly deprived of an informed chance to complete the program; in Brewer's case, the student is adequately warned of the risks of his course of action (inadequate time to study the material), and then seeks to be excused from the consequences (ignorance of the material and bad grades) when the risk comes to pass.

Brewer also contends he is similarly situated to the Asian-American student in that her GPA was the result of mistaken advice and his termination was the result of Hendricks's mistaken belief that Brewer's alteration of the parking tag was not innocent (remember, Brewer claims Feuille would not have dropped him were it not for the parking fiasco at the PSO). The two "mistakes" are obviously nothing like one another, and the mere fact that one can use the highly flexible, amorphous term "mistake" to refer to both does not make the role they would play in a termination decision any more alike. Brewer has not made out a prima facie case.

2. Direct Method of Proof

Brewer also contends that he has met his burden of production without the aid of the burden-shifting analysis. His chief argument is parasitic on his Title VII firing claim: Feuille terminated him because of what Hendricks told him about the PSO firing, and that as Thompson's racism infected Hendricks's decision, so it infected Feuille's. But the argument fails for the

reasons already noted in connection with the Title VII claim based on the PSO firing: Hendricks's independent investigation of the parking scandal absolved the University of any liability for Thompson's misleadingly incomplete information. It may have been against University policy for Feuille to consider Brewer's PSO work in deciding whether or not to retain him in the program, but Title VI does not create liability for any decision that violates a University policy, only for decisions that violate Title VI's policy against racism. We have frequently remarked that we are not a super-personnel board charged with evaluating the general quality of employment decisions, *see Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 697 (7th Cir.2006), and we are equally not a super-enrollment committee. A jury could find no racism here.

Brewer has another argument, not parasitic on his Title VII claim but similar to it, that Thompson's misleading portrayal of and attempts to sabotage his PSO work drove down his Fall 1997 grades and rendered him eligible to be dropped by Feuille a semester later. Brewer received word that two of his Fall grades were adversely affected by the events at the PSO, and claims that a reasonable jury could conclude that if it weren't for Thompson's racist desire to ruin him his cumulative GPA by the end of the Spring 1998 semester would have been above 3.0, the program's minimal requirement.

As this argument is similar to his Title VII

argument, however, it again fails for the same reason: while Thompson may have had some influence over Brewer's Fall 1997 grades, she did not have the singular degree of influence required to make her functionally responsible for Brewer's grades. *Rozskowiak,* 415 F.3d at 613; *Little,* 369 F.3d at 1015. Her meddling at the PSO was at best only a slight input into Brewer's Fall 1997 grades (among other important factors would be the professors' evaluation of the quality of Brewer's work throughout the semester), and Thompson's influence over events at the PSO itself was only partial. This limited influence is not enough to subject the University to liability for Thompson's actions. *Rozskowiak,* 415 F.3d at 613; *Cerutti,* 349 F.3d at 1063.

Finally, Brewer again argues that neutral or positive references to Brewer's race, as well as Feuille's comment about how Brewer had "ruined it for everyone else," show that black students were held to a higher standard than other students, but again the argument fails because Brewer provides no suspicious context from which a reasonable jury could conclude that the neutral or positive references to race in fact masked negative racial attitudes. He also points to some non-rigorous statistical evidence that he suggests shows a history of racist enrollment decisions at the ILIR, but it does not without more add up to a picture that could convince a reasonable jury of racism. *Adreani v. First Colonial Bankshares Corp.,* 154 F.3d 389, 399-400 (7th Cir.1998). The district court was correct to grant summary judgment on Brewer's Title VI claim.

Appendix A

C. Title VII Retaliation: Communications From the PSO to the ILIR

Brewer's final claim is that Hendricks and others at the PSO violated Title VII by making "vague, inaccurate and unfavorable communications" to ILIR faculty in retaliation for his complaints about Thompson's racism. Title VII makes it unlawful for an "employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). Brewer seeks to proceed only under the indirect method of proof. To do so, Brewer must first make out a prima facie case of retaliation by showing that (1) he complained about Thompson's racism, (2) he was subjected to an adverse employment action, (3) he was meeting the PSO's legitimate performance expectations, and (4) he was treated worse than a similarly situated employee that did not complain of discrimination. *Little*, 369 F.3d at 1011; *Rogers v. City of Chicago*, 320 F.3d 748, 754-55 (7th Cir.2003).

Brewer's claim is a little mysterious. According to what Brewer claims both Thompson and Hendricks told him, Brewer only complained to Hendricks about Thompson's racism after Hendricks had already told the ILIR about the parking scandal and her decision to fire Brewer. It seems doubtful, therefore, that any later "vague, inaccurate and unfavorable communications" could have critically affected Brewer's reputation. (He

apparently also earlier complained to another employee, Ron Bacevich, about Thompson, but he has not briefed this possible complication. At any rate Bacevich appears to have been on good terms with Brewer and may not have told others about his complaints, making it again unclear how Brewer's complaints could have given rise to critically damaging communications to the ILIR.)

But at any rate, we need not worry about the strange details of Brewer's claim because he has again failed to show he was treated worse than a similarly situated employee. Here, Brewer does not even contend that he was treated worse than a similarly situated employee, but argues that he does not have to do so to make out a prima facie case, observing that the *Rogers* court stated that a plaintiff must show that "only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action." *Rogers*, 320 F.3d at 754. While that sentence might plausibly be read to favor Brewer's position, the court went on to make it clear that it is the plaintiff's duty to identify a similarly situated employee who was better treated. *See id.* at 755-56 ("When plaintiffs proceeding under the burden-shifting formula of *McDonnell Douglas* cannot produce competent evidence that they were treated differently than similarly situated employees, we must affirm the granting of summary judgment on that basis."); *see also Little*, 369 F.3d at 1012 ("As noted above, to put forth a prima facie case of either racial discrimination or retaliation, Little must show, among other things, that

he was treated differently than a similarly situated employee *who was not in the protected class.*"). Brewer has not identified any similarly situated employee, and his final claim must fall.

III. Conclusion

Brewer has presented evidence that could permit a reasonable jury to conclude that his academic career at the University of Illinois failed for reasons other than his academic merit, indeed that it failed in part because of the racism of an employee of the Personnel Services Office. But he has not presented evidence that the University did not take reasonable steps to avoid the effect of that racism or otherwise violated federal civil rights law. Consequently, we affirm the judgment of the district court.

Appendix B

APPENDIX B –ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DECIDED ON DECEMBER 22, 2005

Lonnell BREWER, Plaintiff,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Kerrin Thompson, in her individual capacity, L. Denise Hendricks, in her individual capacity, Wallace Hendricks, in his individual capacity, Peter Feuille, in his individual capacity, Defendants.

No. 02-2204.

Dec. 22, 2005.

Joanna C. Fryer, Chicago, IL, for Plaintiff.

James C. Kearns, Monica Hersh Khetarpal Sholar, Heyl, Royster, Voelker & Allen, Urbana, IL, for Defendants.

ORDER

BERNTHAL, United States Magistrate Judge.

In September 2002, Plaintiff, Lonnell Brewer, filed a Complaint (# 1) against Defendants Board of Trustees of the University of Illinois, Kerrin Thompson, L. Denise Hendricks, Wallace Hendricks, and Peter Feuille, alleging discrimination in employment and violation of

his constitutional and statutory rights in connection with his education. Federal jurisdiction is based on federal question (28 U.S.C. § 1331). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge.

In July 2005, Defendant Board of Trustees (hereinafter "Board") filed a Motion for Summary Judgment (# 24). After reviewing the parties' pleadings and memoranda, this Court **GRANTS** Defendant's Motion for Summary Judgment (**# 24**).

I. Background

A. Plaintiff's Allegations

Plaintiff alleges that he is an African-American with a learning disability. At relevant times, Kerrin Thompson was special assistant to the director of the University of Illinois Personnel Services Office (hereinafter "PSO"); Denise Hendricks was assistant vice-president of human resources, associate vice-chancellor for administrative affairs, and director of the PSO; Peter Feuille was a professor and the director of the Institute of Labor and Industrial Relations (hereinafter "ILIR") at the University of Illinois; and Wallace Hendricks was a professor in the ILIR and Denise Hendricks' husband.

In August 1997, Plaintiff enrolled in the master's degree program at the ILIR. Beginning August 28, 1997,

he worked for the University of Illinois as a research assistant assigned to the PSO.[1] His assistantship was terminated in April 1998. On June 18, 1998, he was dismissed from the master's degree program. (# 1, ¶ 24.)

B. Procedural Background

Plaintiff's complaint consists of five counts, as follows: (1) Count I, against all Defendants, alleges race discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*); (2) Count II alleges that the Board of Trustees, Thompson, and Denise Hendricks violated the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*) (hereinafter "ADA"); (3) Count III alleges that Thompson, Denise Hendricks, Wallace Hendricks, and Feuille violated Plaintiff's constitutional and statutory rights; (4) Count IV, against all Defendants, alleges a violation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.*); and (5) Count V, against all Defendants, alleges retaliation.

---

[1] The funding for Plaintiff's one-quarter time research assistantship was provided through ILIR as part of a fellowship. A quarter-time appointment obligates the recipient to work ten hours a week for the project, department, or faculty member to which he is assigned. Plaintiff was assigned to work at PSO.

The parties have not distinguished between the assignment and the assistantship, often referring to the PSO assignment as "the PSO assistantship." The Court has generally followed this practice.

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In its May 2003 Order (# 14), the Court dismissed Plaintiff's ADA claim in Count II, the constitutional claim in Count III, and the claims against Kerrin Thompson, Denise Hendricks, Wallace Hendricks, and Peter Feuille in their individual capacities in Counts I, IV, and V. Thus, the Board is the only Defendant in this case. The claims remaining in this case include the following: (1) In Count I, Plaintiff alleges that Defendant Board violated Title VII because Plaintiff was subject to continuous and ongoing acts of race discrimination from supervisors, managers, and faculty; (2) in Count IV, Plaintiff alleges that Defendant violated Title VI because it denied Plaintiff the benefits of participation in the ILIR master's degree program based on his race; and (3) in Count V, Plaintiff alleges that he was subject to adverse actions in retaliation for his complaints to Ron Bacevich, a Labor Relations Specialist in the PSO, and Denise Hendricks regarding discrimination that preceded or occurred in connection with the termination of his employment at the PSO.

C. Affidavit of Ronald Bacevich

As an initial matter, Plaintiff's claim of retaliation in Count V is based on the premise that he complained of racial discrimination to Denise Hendricks and Ronald Bacevich. The Court notes that Plaintiff has stated that he is not offering Mr. Bacevich's statements in Paragraphs 9 to 12 of the affidavit as proof of the matter asserted. Consistent with this response, the Court must limit its consideration of those statements. As a result,

Plaintiff cannot rely on Bacevich's statements in those paragraphs to support his proposed material facts or to challenge Defendant's proposed material facts.

II. Standard of Review

Summary judgment is granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In ruling on a motion for summary judgment, the Court must decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir.1994). The party seeking summary judgment bears the initial burden of showing that no such issue of material fact exists. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

The Court must draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, the nonmoving party may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; rather, he must go beyond the pleadings and support his contentions with proper documentary evidence. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548.

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Pursuant to Rule 56(b), when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that a genuine issue exists as to any material fact and that the moving party is not entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the nonmovant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505. The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* "In such a situation there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

III. Factual Background

The parties disagree about many of the facts in this case. At times, the evidence provided by the parties clears up the dispute; at other times, the dispute is of the "dueling affidavits" variety. Where facts are contested, the Court must accept the factual assertions of the nonmoving party when ruling on a motion for summary judgment. *Pardo v. Hosier*, 946 F.2d 1278, 1280

(7th Cir.1991). Thus, the following recitation is based on the evidence and, where a dispute exists that the evidence does not resolve, the Court accepts Plaintiff's version of the disputed facts.

A. Plaintiff's Participation in the ILIR Program

Plaintiff, an African-American, enrolled in the ILIR master's degree program in August 1997. At that time, the program required a student to complete ten units, with each unit being one class. Most students complete the program in a year and a half, taking four units during the first semester and three units during the second and third semesters. Plaintiff wanted to complete the program in one calendar year. As a result, he inquired about the possibility of taking five units in the fall semester. Although this is an unusual arrangement, Plaintiff persuaded Professor Michael LeRoy, his academic advisor, to approve a five-unit course load. (LeRoy dep., pp. 97, 16.) In addition to his class load, Plaintiff worked approximately ten hours at an assistantship, worked at the University's rehabilitation center as its primary speaker, and was interviewing for jobs.

By the end of the fall semester, Plaintiff was falling behind in his course work. Professor Wallace Hendricks taught one of Plaintiff's courses during the fall semester. He testified that Plaintiff failed to show up for some lab sessions, which negatively affected Plaintiff's grade. (Hendricks dep., pp. 94, 32.) In other

courses, Plaintiff asked Professor Martocchio for an extension to turn in a paper in December 1997, and he asked Professor LeRoy for extensions to complete final exams in two classes. (Brewer dep., pp. 51-53; Martocchio dep., p. 17; LeRoy dep., pp. 17, 19.) Although LeRoy granted the extensions, he informed Plaintiff that he would impose a penalty. (LeRoy dep., pp. 17, 19.) Plaintiff eventually completed the paper and turned in the finals by the extended due dates.

At the end of the fall semester, Plaintiff's grade point average (hereinafter "GPA") was 2.866. As a result, in keeping with ILIR policy, Plaintiff was considered to be on limited status. In January 1998, Professor LeRoy, in his capacity as chairman of the On-Campus Committee (hereinafter "Committee"), sent Plaintiff a letter stating, in pertinent part, as follows:

> The On-Campus Committee has reviewed Fall 1997 semester grades. After completing five units, your grade point average is 2.866.... Since this is below the required minimum of 3.00 on a 4.00 scale you will be placed on limited status. To regain full graduate standing and be eligible to receive the master's degree you must raise your cumulative grade point average. Specifically, you must raise your cumulative GPA to at least a 3.00 by the end of the Spring 1998 semester. Your GPA will be calculated on LIR courses taken since you began the LIR master's program in Fall 1997. Failure to achieve this minimum likely will result in your being dropped from the LIR graduate program.

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(LeRoy letter to Pl., dated January 23, 1998.) Professor LeRoy also advised Plaintiff to take only three units during the Spring 1998 semester.

During the spring semester, Plaintiff enrolled in three classes. After the spring semester, Plaintiff's cumulative GPA was 2.959, below the 3.0 GPA required by the ILIR and the Graduate School and specified in the Committee's letter.

According to the ILIR handbook and procedure, when a student's academic standing is at issue, the Committee will consider whether to retain or dismiss the student from the ILIR program. (ILIR Handbook, p. 11.) The Committee will then offer a recommendation to Professor Feuille, the ILIR director, who makes the final decision. (LeRoy dep., pp. 58, 85; Hendricks dep., p. 67.) Generally, Professor Feuille is not involved in the Committee's decision-making process. (LeRoy dep., pp. 33, 58; Feuille dep., pp. 13-14.)

After the spring semester, Plaintiff's cumulative GPA of 2.959 triggered the Committee's review process. Pursuant to ILIR procedures, the Committee considered whether to retain or dismiss Plaintiff from the program. At that time, the Committee consisted of Professor LeRoy, Elissa Perry, Professor Martocchio, and Gregory Northcraft. (LeRoy dep., p. 35.) On June 1, 1998, Professor LeRoy informed the Committee that Plaintiff's cumulative GPA was below 3.0, described the January 1998 letter the Committee had sent to Plaintiff and ILIR Policy, and then stated as follows:

> To this, I would add my personal observation. Lonnie not only lacks mitigating circumstances, but in fact, presents aggravating circumstances in the form of dismissal from a graduate assistant job. This is extremely rare, and says something about his work standards.... I would also add that this proposed action [(to dismiss him from the ILIR program)] is consistent with ILIR's previous cases that present similar facts (and these lacked the aggravating factor).

(Email message to Committee, dated June 1, 1998.) Professor Feuille subsequently decided to dismiss Plaintiff from the ILIR program.

Professor Martocchio testified that a student's performance in his assistantship would, in general, be completely independent from academic performance, and he did not consider the PSO assistantship a factor in his decision to recommend dismissing Plaintiff from the master's degree program. (Martocchio dep., pp. 34-35.) He also testified that the only factor that he considered in making his decision was Plaintiff's academic status. (Martocchio dep., pp. 40-41.)

The evidence of the email discussion among the Committee members indicates that no one spoke in favor of retaining Plaintiff in the program. In his journal, Plaintiff stated that Professor LeRoy told him the Committee had originally voted to retain him and Professor Feuille intervened and told the Committee to recommend dismissal. (Brewer ex., # 25, p. 25.)

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Plaintiff's testimony regarding what Professor LeRoy told him does not raise a material issue as to what the Committee formally recommended. We accept as true Plaintiff's statement that LeRoy told Plaintiff that Feuille had intervened in the process. Nevertheless, even if LeRoy's statement to Plaintiff accurately characterized the process by which the Committee reached its ultimate decision to recommend dismissal, this does not affect the analysis. It is undisputed that the Committee officially recommended dismissal. Furthermore, whether Feuille decided to dismiss Plaintiff from the program by affirming the Committee's recommendation or by intervening at an earlier stage, both parties agree that Feuille was the final decision-maker.

On June 18, 1998, Plaintiff received a letter from Professor Feuille, informing him that ILIR had dropped him from the graduate program. (Brewer ex., # 25, p. 25.) On September 3, 1998, he received another copy of the letter confirming his dismissal from the program. (Brewer ex., # 25, pp. 1-2.) The letter stated that he had been dismissed because his GPA did not satisfy ILIR requirements and also explained the process for appeal. Plaintiff did not appeal Feuille's decision.

Professor Feuille testified that Plaintiff was dismissed from the program based on his failure to achieve the required GPA. Feuille did not consider the assistantship at all in deciding to dismiss Plaintiff. Feuille testified as follows: "I made the decision to dismiss him from the program because he had been pointedly informed in January that he was on academic

probation. He had one semester to remove himself. He was told what the target he needed to meet was and he failed to meet it. And he was told what the consequences would be." (Feuille dep., pp. 39-40.) Feuille also testified as follows: "He was below 3.0, and ... he had been told, all right, you got to get your cumulative GPA up to this particular level. He didn't. And he had been told what the consequence would be if he didn't. And it was a very straightforward decision made on that basis." (Feuille dep., p. 42.)

It is undisputed that ILIR policy is to "drop from the master's program those students who do not achieve at least a 3.0 GPA after two semesters" and that exceptions to this rule "will be made only in extraordinarily compelling academic circumstances." (ILIR Handbook, p. 11, attached to Leroy's dep. as Ex. 6.) The ILIR Handbook addresses academic standing as follows:

> Students ... whose first semester GPA falls below a 3.0 will have their records carefully scrutinized by the On-Campus Committee ("Committee"). The Committee may recommend to the Director the immediate dismissal of students whose first semester performance is seriously deficient. The Committee may decide that other students will be allowed to continue in the program for a second semester. If so, the Committee will inform these students, in writing, that they will be allowed to continue in the program under the following conditions: (1) they will remain on limited status, (2) they should be enrolled on a full-time basis [(footnote omitted)]; (3) they must

> bring their GPA up to at least a 3.0 by the completion of their second semester, and (4) they will be dropped from the program if they fail to achieve this 3.0 GPA standard after two semesters.... The Committee will carefully scrutinize the records of such students immediately after their second semester. Those students who fail to meet the Committee's condition(s) will be recommended to the Director for dismissal from the master's program. The intent of this paragraph is to drop from the master's program those students who do not achieve at least a 3.0 GPA after two semesters. Exceptions to this rule will be made only in extraordinarily compelling academic circumstances.
>
> . . . . .
>
> Students who wish to appeal their dismissal must petition the Director, in writing, for readmission.

(ILIR Handbook, pp. 11-12.)

Feuille has been ILIR director since 1994. During that time, Feuille testified that he could not think of any time when the Committee recommended retaining a student who had a GPA less than 3.0 after two semesters. (Feuille dep., p. 32.) He remembered one occasion where a student with a GPA of less than 3.0 was ultimately allowed to return to ILIR. On that occasion, he first agreed with the Committee's recommendation to dismiss the student because her GPA was below 3.0 at the end of two semesters. (Feuille dep., p. 35.) The student appealed the dismissal, and as a result of the appeal, Feuille learned that she had

followed incorrect advice from a faculty member. (Feuille dep., p. 34-35.) Because her failure to achieve a 3.0 was the result of her reliance on the mistaken advice of a faculty member, he rescinded her dismissal and allowed her to return to the ILIR program.

B. Plaintiff's Assistantship

In conjunction with his enrollment in the ILIR master's degree program, Plaintiff was offered a one-quarter time research assistantship. He was assigned to work at the PSO. Denise Hendricks was director of the PSO at the time and Kerrin Thompson was special assistant to Hendricks. Thompson was Plaintiff's supervisor in terms of his hours and overall assignments; however, he worked on different projects during his assistantship and various people supervised the particular projects.

In October 1997, Plaintiff brought his fiancée, a Caucasian, to the PSO to meet some of his coworkers. He stated in his journal that Thompson "seemed surprised at the race of my fiancee and her posture became noticeably and increasingly hostile afterwards." (Brewer ex., # 25, p. 5.) Elyne Cole, a PSO employee who is African-American, testified that she observed that Thompson had a good opinion of Plaintiff and she did not observe any negative attitude or change in Thompson's attitude toward Plaintiff at any time up to the time of his discharge. (Cole dep., pp. 18-22.)

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During the fall semester, Plaintiff worked primarily on one assignment. He testified that he was allowed to schedule his hours and his own deadline for completion of the project. He was unable to complete the project by his chosen deadline and asked for an extension until the following Monday. When he informed Judy Baker, his supervisor on the project the he could not complete it as planned, she told him that he could turn it in on Monday and that Denise Hendricks and Kerrin Thompson wanted to meet with him. (Brewer ex., # 25, p. 8.) He was able to complete the project by Monday. Both Thompson and Hendricks were unhappy that he had not met his initial deadline and as a result, each of them met separately with Plaintiff to discuss his performance. Hendricks spoke to him regarding problems with attendance and failure to meet deadlines. (Hendricks dep., pp. 20-21.) After Hendricks looked at Plaintiff's completed project, she told him that she was very happy with it and that she may have acted a bit too hastily in her previous criticism of him for turning the project in late. (Plaintiff dep., pp. 60-61.)

At some point during the fall semester, Hendricks spoke to Professor Feuille or Susan Sands, the assistant director at ILIR, about Plaintiff's performance. Sands offered to switch Plaintiff to another assignment for the remainder of his assistantship. (Hendricks dep., pp. 20-21.) Hendricks wanted Plaintiff to continue at the PSO, provided he could meet PSO's expectations. (Hendricks dep., p. 21.) Feuille subsequently sent Plaintiff a letter dated January 23, 1998, in which he stated that Plaintiff's

PSO supervisors had "indicated that 'your [Plaintiff's] approach to your job duties lacked commitment and a professional attitude toward the timely completion of your assigned work.' " (Feuille letter to Pl. dated January 23, 1998.) Professor LeRoy also referred to his performance in his January 23, 1998, letter to Plaintiff on behalf of the Committee, in which he stated: "I also had reports of sub-par performance from faculty and supervisory staff from the campus Personnel Services Office." (LeRoy letter to Plaintiff dated January 23, 1998.)

Plaintiff testified that he had no more conversations with anyone at PSO regarding his job performance until the day Denise Hendricks terminated his assignment at the PSO. (Brewer dep., pp. 62-63.)

In April 1998, a problem arose related to Plaintiff's parking tag. Plaintiff testified that when he first began his assistantship, Thompson gave him a parking tag and told him he could use it to park either at the PSO or at the ILIR building when he was doing work there for the PSO. (Brewer dep., pp. 65-67.) A parking tag lists the code for the parking lot in which the tagholder is authorized to park. E7 is apparently the code for the PSO lot and C8 is the code for the ILIR parking lot. (Hendricks dep., pp. 50-52.) Plaintiff testified that he did not write "E7" on the tag, and he "may have written the C8" but he was not sure. (Brewer dep., pp. 66-67.) Alternatively, Plaintiff admitted that he did write one of the lot numbers on the tag, consistent with Thompson's instructions. (Brewer ex., # 25, p. 17.)

Regardless of whether Plaintiff or someone else wrote C8 on the tag, Plaintiff asserts that this was consistent with the instructions Thompson had given him regarding which lots he was allowed to park in.

At some point, the parking tag tore so it would not hang on Plaintiff's mirror. Plaintiff tried laying it on the dashboard, but he received a ticket. Plaintiff then took his tag to Parking Services to get a replacement. Parking Services observed that Plaintiff's tag listed two lots, E7 and C8. Parking Services informed him that he should not have a tag to park in the ILIR lot and they would check the application to figure out where he was authorized to park. (Brewer dep., p. 68.)

Parking Services subsequently called the PSO and spoke to Thompson. Thompson testified that Parking Services was concerned because the parking tag had two lot numbers written on it; one that they knew they had authorized, and one that they did not think they had authorized. (Thompson dep., p. 27.) She testified that she told Denise Hendricks what Parking Services had told her; that Plaintiff had filled in another lot number on the parking tag. Specifically, Thompson told Hendricks that she "had received a call from parking services that ... one of our hang tags had been altered to allow Lonnie to park in another lot." (Thompson dep., p. 29.) Elyne Cole testified that she heard Thompson tell Denise that Parking Services said the parking tag had been altered. (Cole dep., p. 21.)

A few days before April 21, 1998, Plaintiff went to

work at PSO and met with Thompson. (Brewer dep., pp. 74.) He testified as follows:

> Kerrin [Thompson] asked me to come into her office, she was irate. She was irate because of the—the issue with the tag because I wrote C8 on it. And she explained to me that I wasn't supposed to have the tag at all and that she had gone on a limb and basically falsified the information on the application so that I could have a tag. So she was like very upset and she was being very belligerent I would call it and inappropriate in both her tone and what she was saying to me.
>
> So at one point I finally—I stood up ... and ... I asked her, you know, not to speak to me like I'm some kind of child. And, you know, she got even more upset that I was pushing back and under her breath mumbled a couple things, and I said, you know, what did you say?
>
> And so then eventually I said, look, I don't have to take this, and I started to walk off. And she called mean .... as I was walking out the door, and I turned back around, and asked her to repeat what she said. And she, you know, didn't repeat that specifically but said, you know, a few other things, and then I felt like, you know, it was time to walk out of the office. And she said something to the effect of, you know, get out of here and—I don't even remember exactly what else she said.

(Brewer dep., pp. 75-76.) In addition, Plaintiff stated in his journal that Thompson said to him, "I am through with you people." (Brewer ex., # 25, p. 18.)

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The same afternoon, Plaintiff met with Denise Hendricks and Hendricks informed him that she was terminating his assistantship effective April 21, 1998. Regarding that meeting, Plaintiff testified as follows:

> [At that meeting,] she officially, you know, terminated me and explained that she really didn't feel like this was—this issue merited termination, but that she had a relationship with the ... parking services and that, you know, she was afraid that she would lose her parking flexibility if somebody didn't you know, in effect pay for this.

(Brewer dep., p. 77.) Plaintiff also stated that he told her about his conversation with Thompson and Hendricks told him that was something he would have to work out with Thompson. (Brewer dep., p. 78.) In his journal, Plaintiff stated that, during this meeting, he told her, "I understand that what I did was wrong. However, I do not understand why I am being treated this way. Kerrin gave me the tag and told me to park." (Brewer ex., # 25, p. 20.) He realized that Hendricks "simply wanted [him] out" when she said, "you admitted to altering the temporary parking tag, so I did not need to know much more." (Brewer ex., # 25, p. 20.) He also said that Hendricks told him she needed to protect her relationship with Parking Services. (Brewer ex., # 25, p. 20.)

Hendricks testified that Plaintiff was permitted to park in the PSO lot which was immediately adjacent to the PSO office and Thompson did not have the authority

to tell him to add the code for the ILIR lot to the parking tag. (Hendricks dep., pp. 51, 49.) PSO had temporary tags that they could give to people for various purposes; however, they were limited to use in the PSO lot. (Hendricks dep., p. 53.) Hendricks is not aware of any occasions on which she or anyone in the PSO office provided temporary tags to allow people to park anywhere except the PSO lot. (Hendricks dep., p. 53.) Ronald Bacevich stated in his affidavit that during 1997-98, the PSO had one or more parking tags that authorized parking in lots other than the PSO lot, including the ILIR lot. He knew this because he used one on a regular basis. (Bacevich aff., ¶ 13.)

Hendricks testified that she terminated the assistantship solely because Plaintiff falsified a parking tag. (Hendricks dep., p. 35.) She did not contact Plaintiff to get his side of the story and she did not do any independent checking before deciding to terminate Plaintiff's assistantship. (Hendricks dep., pp. 37-38.) She based her conclusion that Plaintiff had falsified the tag on her visual inspection of the tag and the information that Thompson relayed to her from Parking Services. (Hendricks dep., pp. 35-36.) She stated that Thompson told her that Plaintiff had taken his tag to Parking Services to get it replaced; Parking Services saw that it had been marked to add another parking lot in addition to the lot that was printed on the hang tag; and Parking Services then contacted PSO to find out why Plaintiff's tag listed two parking lots. (Hendricks dep., p. 36.)

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Regarding the information Thompson provided, Hendricks stated she had no reason to question what Thompson told her. Specifically, regarding her relationship with Thompson, Hendricks stated as follows: "She is my assistant. She is basically, does part of my job for me.... And in certain instances, and represents me. So, I would have no reason to question what she says." (Hendricks dep., p. 38.) At some point, Hendricks told Susans Sands about the issue. (Hendricks dep., p. 40.) Sands asked her if she wanted to continue or terminate Plaintiff's assistantship. (Hendricks dep., p. 70.)

Hendricks was the only person who participated in the termination decision. (Hendricks dep., p. 35.) She did not talk to Thompson about whether to discharge Plaintiff. (Hendricks dep., p. 39.) The only person she discussed the issue with was Susan Sands. When asked whether she would have changed the outcome for Plaintiff in terms of his termination if she became aware that Thompson had made racist remarks, Denise Hendricks stated that the remarks did not make him change the parking tag, therefore she would not have taken the remarks into consideration when making the decision whether to terminate Plaintiff's assistantship. (Hendricks dep., pp. 67-68.)

Professor Feuille was aware that Denise Hendricks had terminated Plaintiff's assignment at PSO. On about April 22, 1998, Professor Feuille and Susan Sands met with Plaintiff. At the meeting, Feuille informed Plaintiff that the ILIR was terminating

Plaintiff's assistantship. He gave Plaintiff a letter that stated, in pertinent part, as follows:

> We have been informed by PSO that your work-related behaviors have fallen substantially short of their expectations. Indeed, the PSO administrators are so disappointed in your behavior that, effective April 21, 1998, PSO is no longer willing to have you work for them.
>
> As you recall, this is not the first time your PSO superiors have been disappointed in your RA work. As I stated in my January 23, 1998 letter to you, your PSO supervisors indicated that "your approach to your job duties lacked commitment and a professional attitude toward the timely completion of your assigned work."
>
> As a result of PSO's termination of your RA work assignment, the Institute of Labor and Industrial Relations is terminating and canceling your Research Assistantship for the balance of the Spring 1998 Semester, effective April 21, 1998. Among other things, this means that you will not be paid after this April 21 date.
>
> The words in this letter cannot fully convey how greatly disappointed, dismayed, and upset we are with your performance. ILIR has worked for many years to establish and maintain a strong relationship with PSO. This relationship has resulted in an annual RA position that has enabled several of your predecessors to obtain the financial aid necessary to pursue a graduate education, as well as provide them with the opportunity to obtain some professionally relevant and valuable work

> experience. However, with your unacceptable behaviors you have placed this strong relationship in jeopardy, to the possible detriment of the students who will follow you into our program.

(Feuille letter to Plaintiff, dated April 21, 1998.)

IV. Analysis

Defendant Board argues that the Court should grant summary judgment in its favor because Plaintiff has failed to establish, by either the direct or the indirect method, that Defendant discriminated against him in his employment or in his participation in the master's degree program. In addition, Defendant reiterates its argument that the Court should dismiss Plaintiff's Title VII and Title VI claims on the grounds that they were untimely based on applicable statutes of limitations.

A. Analysis Regarding the Statute of Limitations Argument

In its motion to dismiss (# 6), Defendant argued that the applicable statutes of limitations barred the Title VII claims in Counts I and V, the Title VI claim in Count IV, and the constitutional claim in Count III. Plaintiff did not challenge Defendant's statute of limitations argument regarding the constitutional claim, and the Court dismissed that claim. (Order, # 14.) When ruling on the motion to dismiss, the Court did not address the

statute of limitations arguments for the Title VII and Title VI claims. The Court will now consider these arguments.

1. Statute of Limitations for the Title VI Claim

The parties disagree as to the applicable statute of limitations for a Title VI claim. Plaintiff contends that the statute of limitations is five years, consistent with the Seventh Circuit's decision in *Beard v. Robinson*, 563 F.2d 331, 338 (7th Cir.1977) (holding that a five-year statute of limitations applies to statutory claims brought under the Civil Rights Act of 1991 (42 U.S.C. § 1981)). Defendant argues that the limitations period is two years, based on the Illinois statute of limitations for personal injury claims.

Defendant contends that the Seventh Circuit partially overruled *Beard* in *Kalimara v. Illinois Department of Corrections*, 879 F.2d 276 (7th Cir.1989), and *Porter v. United States GSA*, 151 F.3d 1033, 1998 WL 516785 (7th Cir.1998). Neither *Kalimara* nor *Porter* involve a Title VI claim. Defendant also cites *Torrespico v. Columbia College*, 97 C 8881, 1998 WL 703450, *11 (N.D.Ill. Sept. 30, 1998) (unreported) (stating that Title VI claim was probably subject to a five-year statute of limitations).

In support of its argument that Illinois' two-year statute of limitations for personal injury should be applied to Title VI claims, Defendant also relies in part

on *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), in which the United States Supreme Court held that a state should apply its limitations period for personal injury actions to claims brought pursuant to Section 1983 (42 U.S.C. § 1983). In *Allen v. Board of Governors of State Colleges and Universities*, the Northern District court declined to apply the reasoning in *Wilson* to the Title VI context. *Allen v. Bd. of Governors of State Colls. and Univs.*, No. 93 C 380, 1993 WL 69674, *2 (N.D.Ill. Mar. 11, 1993) (unreported). Instead, the Northern District court applied a five-year limitations period to a Title VI claim. *Id.* (citing *Lewis v. Russe*, 713 F.Supp. 1227, 1232 (N.D.Ill.1989)). This Court finds persuasive the Northern District court's reasoning rejecting *Wilson* and applying a five-year limitations period for Title VI claims. Therefore, the Court will apply that limitations period. *See id.*

Here, Plaintiff received a letter from ILIR on June 18, 1998, informing him that ILIR had dropped him from the graduate program. (Brewer ex., # 25, p. 25.) He filed his complaint in this case on September 26, 2002, less than five years later. Based on a five-year limitations period for a Title VI claim, Plaintiff timely filed his claim. Accordingly, the statute of limitations does not bar the claim.

2. Statute of Limitations for the Title VII Claim

The parties agree that, generally, a plaintiff must file his claim within ninety days after receiving a right-

to-sue letter from the Equal Employment Opportunity Commission (hereinafter "EEOC"). Plaintiff received his letter on March 19, 2002, and filed suit *in state court* within the limitations period. When the state court dismissed his claim for lack of jurisdiction, Plaintiff filed this suit in federal court on September 26, 2002, after the expiration of the ninety-day period.

Defendant concedes that, if Illinois courts have concurrent jurisdiction with federal courts over Title VII claims, then Plaintiff's filing of his state court suit would toll the statute of limitations as to the federal court suit. However, Defendant argues that Illinois courts do not have concurrent jurisdiction; instead, Section 8–111(C) of the Illinois Human Rights Act vests the Illinois Department of Human Rights Commission with exclusive jurisdiction over cases involving civil rights violations, including Title VII cases. *See* 775 ILCS 5/8–111(C) (West 2000). On this basis, the Illinois appellate court affirmed the circuit court's dismissal of the case that Plaintiff filed in state court. *Brewer v. Bd. of Trs. of the Univ. of Ill.*, 339 Ill.App.3d 1074, 274 Ill.Dec. 565, 791 N.E.2d 657, 664 (2003). That court's decision explains its reasoning.

Plaintiff contends that the Seventh Circuit has rejected the argument that Illinois courts do not have jurisdiction over Title VII claims, and relies on the Seventh Circuit court's decision in *Donnelly v. Yellow Freight*, 874 F.2d 402 (7th Cir.1989). In *Yellow Freight*, the court stated as follows:

Yellow Freight argues that, at least in Illinois, state

> courts do not provide a forum for Title VII litigation and therefore jurisdiction lies exclusively with the federal courts. We must reject this argument. Even if the *Mein [v. Masonite Corp.*, 109 Ill.2d 1, 92 Ill.Dec. 501, 485 N.E.2d 312, 315 (1985)] court did, in fact, intend to exclude Title VII claims from the Illinois courts [(footnote omitted)], neither the Illinois courts nor legislature have the power to close state court doors to federal causes of action. When presented with a federal claim over which concurrent jurisdiction exists, state courts are under a 'duty to exercise (jurisdiction)' over the federal claim.... Once Congress has vested jurisdiction over a federal claim in the state courts, the state courts, including the courts of Illinois, are under a constitutional obligation to exercise jurisdiction.

Yellow Freight, 874 F.2d at 409. In addition, the *Yellow Freight* decision expressly overruled *Brown v. Reliable Sheet Metal Works*, in which the Seventh Circuit court had held that the filing of a complaint in state court did not toll the Title VII ninety-day filing period because the plaintiff did not exhaust her state administrative remedies. *See Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932, 934-35 (7th Cir.1988). In *Yellow Freight*, the Seventh Circuit court held that the plaintiff's failure to exhaust her state administrative remedies did not defeat the tolling effect of her state court filing on Title VII's ninety-day window. *Yellow Freight*, 874 F.2d at 410. The court stated, "[b]ecause we find that jurisdiction over Title VII claims is *vested in both state and federal court*, we reject Yellow Freight's argument that the state court filing did not toll the 90-day statute of limitations." *Id.*

(emphasis added). This Court is bound by Seventh Circuit precedent. Accordingly, the Court concludes that Plaintiff's filing of a complaint in state court tolled the statute of limitations for Plaintiff's Title VII claim and he timely filed his suit in federal court.

In the alternative, Plaintiff also argues that if the Court determines that the filing of the state court case did not toll the statute of limitations for filing this case, the Court should apply the doctrine of equitable tolling. The Court agrees that this doctrine provides an alternative mechanism for tolling the statute of limitations. The Seventh Circuit Court has stated that the ninety-day period of limitations in Title VII actions may be equitably tolled when circumstances warrant. *Jones v. Madison Serv. Corp.*, 744 F.2d 1309, 1314 (7th Cir.1984) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)). "Equitable tolling is to be restricted and reserved only for situations in which the claimant has made a good faith error (e.g., brought suit in the wrong court) or has been prevented in some extraordinary way from filing his complaint in time." *Jones*, 744 F.2d at 1314 (citing *Smith v. Am. President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir.1978)).

Here, to the extent that Plaintiff's filing in state court constitutes an error, it was a "good faith error" as the Seventh Circuit defined that phrase in *Jones*. Accordingly, the Court concludes that the statute of limitations does not bar Plaintiff's Title VII claim.

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B. Analysis Regarding the Title VII Claim (Count I)

Title VII makes it unlawful for an employer to discriminate against an individual in his employment based on that person's race. 42 U.S.C. § 2000e-2(a)(1). A plaintiff may prove discrimination by presenting direct or circumstantial evidence of intentional discrimination, or he may proceed under the burden-shifting method established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Jordan v. City of Gary, Ind.*, 396 F.3d 825, 831-32 (7th Cir.2005).

Plaintiff's claim in Count I alleges that Defendant violated Title VII by terminating Plaintiff's assistantship because of his race. Defendant argues that the Court should grant summary judgment in its favor on the Title VII claim in Count I for the following reasons: Regarding the direct method, (1) Thompson did not make the alleged racist comments; (2) even if Thompson did make the comments, it does not constitute direct evidence of discrimination because she was not the primary decision-maker regarding the termination of Plaintiff's assistantship; and (3) the race-related comments by Denise Hendricks, Feuille, and Wallace Professor Hendricks do not constitute direct evidence of discrimination. Under the indirect method, (4) Plaintiff cannot prove his *prima facie* case because he failed to satisfy legitimate performance expectations; (5) Plaintiff failed to identify a similarly-situated person who was treated more favorably; and (6) Plaintiff has failed to

establish pretext.

1. Direct Evidence

To prove discrimination using direct evidence "essentially requires an admission by the decision-maker that his actions were based on the prohibited animus." *Jordan*, 396 F.3d at 832 (quoting *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir.2000)). Such admissions rarely occur. *Radue*, 219 F.3d at 616. Therefore, a plaintiff may also defeat summary judgment under the direct method of proof by constructing a "convincing mosaic" of circumstantial evidence that "allows a jury to infer intentional discrimination by the decision-maker." *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 504 (7th Cir.2004) (quoting *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir.1994)). Circumstantial evidence may come in the form of "suspicious timing, ambiguous statements oral or written, [or] behavior toward or comments directed at other employees in the protected group ..." *Dandy v. United Parcel Serv., Inc.*, 388 F.3d 263, 272-73 (7th Cir.2004) (quoting *Troupe*, 20 F.3d at 736). Nevertheless, even circumstantial evidence must point directly to a discriminatory reason for the employer's action. *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir.2003); *Chiaramonte v. Fashion Bed Group, Inc., a Div. of Leggett & Platt, Inc.*, 129 F.3d 391, 396 (7th Cir.1997) (under the direct method, the plaintiff must produce evidence that relates to the motivation of the decision-maker responsible for the contested decision).

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Plaintiff asserts that he has presented direct evidence of discrimination based on Thompson's and Denise Hendricks' comments, along with the facts that no other African-American ever received the PSO assistantship and that Plaintiff was the only student who was alleged to have performance issues or whose assistantship assignment was terminated.

Regarding Thompson, the parties dispute whether Thompson made the comments at issue. Therefore, the Court accepts as true Plaintiff's version. *See Pardo*, 946 F.2d at 1280 (where facts are contested, the court accepts plaintiff's factual assertions when ruling on a motion for summary judgment). According to Plaintiff, Thompson questioned him about his engagement to a Caucasian woman. In addition, during the discussion between Plaintiff and Thompson regarding the parking tag, Thompson referred to Plaintiff using a racial epithet and she stated, "I am through with you people." (Brewer ex., # 25, p. 18.) Plaintiff also testified that Elyne Cole, a PSO employee, told him that Thompson did not like Black people and that she had heard Thompson make disparaging stereotypical comments about Plaintiff to Hendricks, such as references to his lack of urgency around work. (Brewer dep., pp. 29-30, 31.) Based on this evidence, a reasonable jury could conclude that Thompson was biased against Plaintiff because of his race.

According to Plaintiff, Hendricks' race-related comments include the following: (1) In her deposition,

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Denise Hendricks stated that Plaintiff was the only African-American who held the ILIR assistantship during the entire history of the program and the only student whose assistantship was terminated (D. Hendricks dep., pp. 55, 57-58); (2) Denise repeatedly referred to the fact that Plaintiff was the first African-American male to hold the PSO assistantship (Brewer dep., pp. 84-86); (3) at the end of the first semester when Denise was discussing issues of concern with Plaintiff, she stated that he was the first African-American to hold the PSO assistantship (Brewer ex., # 25, p. 9); and (4) Denise told Plaintiff that she "was excited to have a minority" in the assistantship (Brewer ex., # 25, p. 9). These race-related remarks were uniformly positive or factual statements. A reference to race does not automatically constitute evidence of racial animus or *discrimination* based on race. Moreover, these comments were wholly unrelated to Hendricks' decision to terminate Plaintiff's assignment.

Although Plaintiff refers to these statements in his discussion regarding direct evidence, he does not, in fact, argue that they constitute direct evidence of *discrimination;* instead, he asserts that they suggest that Plaintiff was subject to heightened scrutiny because he was the first African-American to hold the PSO assistantship. The fact that an individual may be subject to heightened scrutiny because of his race or that African-Americans may be treated as a separate subgroup based on their race does not constitute direct evidence of discrimination based on race. *See Phaup v. Pepsi- Cola Gen. Bottlers, Inc.,* 761 F.Supp. 555, 564

(N.D.Ill.1991) (in the Title VII context, concluding that certain statements that were benign or unrelated to layoffs did not constitute direct evidence of discrimination, but might, in conjunction with other evidence, be considered evidence of pretext).

In addition, Plaintiff contends that no other African-American was ever granted the PSO assistantship, either before or after it was given to Plaintiff, and that Plaintiff was the only student who was alleged to have performance issues or whose assistantship was terminated. This evidence is not related to the motivation of the decision-maker, therefore, it does not constitute direct evidence of discrimination. *See Chiaramonte,* 129 F.3d at 396 (direct evidence "must relate to the motivation of the decision-maker responsible for the contested decision").

Plaintiff primary argument seems to be that "Thompson's and Hendricks [(*sic*)] involvement with the decision [to terminate Plaintiff's assistantship], coupled with the fact that Thompson's most egregious racial remarks were made in conjunction with the termination decision" (# 26, p. 33) constitutes direct evidence of racial discrimination.

Assuming Thompson was biased against Plaintiff because of his race, Thompson's bias does not constitute *direct* evidence that Hendricks' decision to terminate Plaintiff's PSO assignment was based on race. The Seventh Circuit has stated that the prejudices of an employee, normally a subordinate, may be imputed to

the employee who has formal authority over the plaintiff's job "where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision." *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir.1997); *Cowan_Glenbrook Sec. Servs., Inc.*, 123 F.3d 438, 443 (7th Cir.1997) (stating that prejudice on the part of an employee may be imputed to a decision-maker if the employee, by feeding false information, was able to influence the decision). Thus, Thompson's bias might be imputed to Hendricks if she gave Hendricks false information or concealed relevant information such that a nexus exists between Thompson's bias and Hendricks' decision. *See e.g., Porter v. Ill. Dep't of Children and Family Servs.*, 987 F.Supp. 667, 673 (N.D.Ill.1997), *aff'd*, 165 F.3d 32 (7th Cir.1998) (stating that an admission of bias is material only if it is related to the employment decision in question). The Court will consider whether the evidence shows that Thompson's bias should be imputed to Hendricks' decision, either because Thompson gave Hendricks false information or because she concealed relevant information.

Plaintiff has provided no evidence to support the premise that Thompson gave Hendricks false information regarding the parking tag. Instead, the evidence shows that Thompson simply passed on information that Parking Services had given her. Thompson testified that she told Denise Hendricks what Parking Services had told her. Specifically, Thompson testified that she told Hendricks that she "had received a

call from parking services that ... one of our hang tags had been altered to allow Lonnie to park in another lot." (Thompson dep., p. 29.) Hendricks testified that Thompson told her that Plaintiff had taken his tag to Parking Services to get it replaced; Parking Services saw that it had been marked to add another parking lot in addition to the lot that was printed on the hang tag; and Parking Services then contacted PSO to find out why he had two parking lots listed on his tag. (Hendricks dep., p. 36.)

Thus, although it is true that the Hendricks' information about the parking tag came from Parking Services *via* Thompson, here, Thompson simply relayed the information to Hendricks. In contrast, cases where courts have imputed discriminatory animus of another employee to the decision-maker involve a greater degree of influence by the subordinate. For example, in *Shager v. Upjohn Company,* the court denied summary judgment for the employer because the facts showed that Lehnst, the non-decisionmaking employee, set up the plaintiff to fail by assigning him an unpromising territory and subsequently influenced the committee that made the decision by portraying the plaintiff's performance "in the worst possible light." *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990). The court reversed the district court's grant of summary judgment for the employer, noting that Lehnst's influence may well have been decisive and that if the committee acted as a conduit for Lehnst's prejudice, then the employer would be liable even if the committee was not aware of Lehnst's prejudice. *Id.* Similarly, in *Gusman v. Unisys Corporation,*

the plaintiff's immediate supervisor, Troudt, exhibited overt age bias, and the plaintiff was discharged *as a result* of Troudt's recommendation. The court stated that reasonable jurors could conclude that Troudt lied to his superiors about the plaintiff's skills, ensuring that they would approve his recommendation. In affirming the jury verdict in favor of the plaintiff-employee, the court stated, "[a]n employer cannot escape responsibility for wilful discrimination by multiple layers of paper review, when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of older workers." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir.1993) (citing *Shager*, 913 F.2d at 405).

In these cases, the biased employee did more than pass on information from a third party; his or her role was more significant and involved some evaluation or assessment of the discharged employment, such as a direct recommendation (*Gusman*), or lying about the plaintiff's skills and portraying his performance in the "worst possible light" (*Shager*). In contrast, courts have granted summary judgment to employers in cases where the employee's role is more neutral or where the plaintiff fails to demonstrate a causal link. For example, in *Blanding v. Pennsylvania State Police*, the plaintiff claimed that his supervisor's recommendation and the decision of his superiors to discharge him were based on a report submitted by another employee, Marakovits, whom the court accepted was biased. *Blanding v. Penn. State Police*, 12 F.3d 1303, 1309 (3d Cir.1993). Marakovits' report misrepresented facts regarding the plaintiff, however,

the court stated that the report "consisted of narrative summaries of what he did and what he had been told by the persons he had interviewed.... It does not comment, or pass any judgment, upon the credibility of Blanding or any other person interviewed." *Id.* Because the plaintiff failed to show a connection between the errors in the report (and therefore Marakovits' bias) and the discharge decision, the court granted summary judgment for the employer. Finally, in *Porter v. Illinois Department of Children and Family Services,* the court found that the plaintiff's supervisor, Williams, had exhibited racial bias. Although Williams had no authority to discharge the plaintiff, she had instigated the process to discharge him and prepared an unfavorable written evaluation of his performance. Nevertheless, the court granted the employer's motion for summary judgment because the plaintiff failed to establish a causal relationship between Williams' racial animus and the discharge decision. The court stated as follows:

> The possibility that Williams played a significant role in plaintiff's termination does not imply that her alleged bias was also a material factor in that discharge. An admission of bias is material only if it is "related to the employment decision in question." *Fuka v. Thomson Consumer Elecs.,* 82 F.3d 1397, 1403 (7th Cir.1996). Plaintiff seeks to forge this causal relationship by suggesting that racial animus led Williams to reject his work—thus saddling him with an artificially inflated caseload—or to invent the charges against him. To support these arguments, plaintiff must produce enough evidence to raise an

> inference that his work was satisfactory or that he was unfairly singled out for discipline. These propositions find absolutely no support in the record.

(*Porter*, 987 F.Supp. at 673.)

Here, the record contains no evidence suggesting that Thompson changed or misrepresented the information she received from Parking Services or that she filtered the facts or presented them in the worst possible light. Instead, she relayed information about the phone call she had with Parking Services. As a result, this is not a situation in which the information that Thompson gave Hendricks is suspect because it may have been a product of bias. Therefore, Plaintiff has failed to establish a nexus between Thompson's bias and Hendricks' decision to discharge Plaintiff. *See Cowan*, 123 F.3d at 443-44 (stating that discriminatory statements unrelated to challenged employment decision are not direct evidence of causation) (citing *Furr v. AT & T Tech., Inc.*, 824 F.2d 1537, 1549 (10th Cir.1987)).

Plaintiff could also establish a nexus by showing that Thompson withheld information from Hendricks. Plaintiff has testified that, in September 1997, Thompson told him he could park in both lots and therefore, either he (with Thompson's permission) or Thompson wrote both parking lot numbers on the tag. Both Thompson and Hendricks have testified that Thompson had no authority to authorize Plaintiff to park in both lots. Nevertheless, accepting as true Plaintiff's testimony that

Thompson told Plaintiff that he could park in the ILIR lot, then Thompson apparently withheld that information from Hendricks when she reported on what Parking Services had told her.

To conclude that Thompson was motivated by racial animus when she failed to tell Hendricks this information in April, the Court must infer that she set Plaintiff up in September 1997 by giving him inaccurate information, and then sprang the trap in April 1998 after Plaintiff innocently took his parking tag to Parking Services when the tag ripped. Such a scenario goes well beyond the kind of evidence that constitutes a "convincing mosaic" sufficient to defeat summary judgment based on direct evidence. As the Seventh Circuit has stated, "[a] little common sense is not amiss in a discrimination case." *Wallace,* 103 F.3d at 1400.

Moreover, Plaintiff testified that when the unauthorized tag came to light in April, Thompson was irate with him because she had gone out "on a limb" for him in September when she "basically falsified the information on the application" herself. (Brewer dep., pp. 75-76.) Plaintiff's testimony regarding Thompson's reaction undermines his argument that Thompson was motivated by racial animus when she reported to Hendricks and implies instead that she was worried about getting in trouble because she falsified the parking tag.

Plaintiff also testified that Hendricks told him she did not think the parking tag incident merited his

termination but she was concerned about the PSO's relationship with Parking Services. (Brewer dep., pp. 76-77.) This evidence shows that Hendricks was motivated by political reasons, not racism, when she terminated Plaintiff's work assignment. Thus, it does not support Plaintiff's argument that Thompson's alleged racism influenced Hendricks' decision. Whether Hendricks ought to have terminated the assignment based on political motives is not up to the Court. The Seventh Circuit has repeatedly held that courts do not "sit as a super-personnel department that re-examines an entity's business decision and reviews the propriety of the decision." *Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir.2000) (affirming summary judgment for the employer in a Title VII action).

A plaintiff constructing a circumstantial case of discriminatory intent under the direct method of proof must produce "a 'convincing mosaic' of circumstantial evidence" that points "directly to a discriminatory reason for the employer's action." *Sartor v. Spherion Corp.*, 388 F.3d 275, 278 (7th Cir.2004) (quoting *Troupe*, 20 F.3d at 737). The circumstantial evidence on which Plaintiff relies here does not create a convincing mosaic of circumstantial evidence sufficient to defeat summary judgment based on direct evidence.

2. Indirect Evidence

Defendant next argues that Plaintiff has failed to present indirect evidence that establishes a *prima facie*

case of discrimination.

To establish a *prima facie* case of race discrimination in employment under the indirect method, a plaintiff must show the following: (1) he is a member of a protected class; (2) his performance met the defendant's legitimate expectations; (3) he suffered an adverse employment action; and (4) the defendant treated other similarly-situated persons outside of the plaintiff's classification more favorably. *Bratton v. Roadway Package Sys. Inc.*, 77 F.3d 168, 176 (7th Cir.1996) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817). If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged action. *Id.* Once the defendant does so, the burden of production shifts back to the plaintiff to prove by a preponderance of the evidence that the reason proffered by the defendant is actually a pretext for discrimination. *Id.*

Plaintiff is an African-American, therefore, he satisfies the first element of the *McDonnell Douglas* test. Furthermore, the termination of his work assignment and assistantship constitutes an adverse employment action.[2] However, Defendant contends that (1) the

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[2] Plaintiff also contends that the communication between PSO and ILIR constitutes an adverse employment action. The Court disagrees. An adverse employment action is a significant change in the claimant's employment status such as hiring, discharge, denial of promotion, reassignment to a position with significantly different job responsibilities, or an action that causes a substantial change in benefits. *Rhodes*, 359 F.3d at 504. Plaintiff has presented no

undisputed evidence shows that Plaintiff failed to meet PSO's legitimate performance expectations; (2) Plaintiff has failed to identify a similarly-situated person that PSO treated more favorably; and (3) Plaintiff has failed to provide evidence to show that Defendant's proffered reason for terminating his assistantship was a pretext for discrimination.

a. Defendant's Legitimate Expectations

Regarding the second element, Defendant contends that Plaintiff failed to meet his employer's legitimate performance expectations based on Plaintiff's failure to meet deadlines, his attendance record, and also because Plaintiff allegedly falsified the parking tag.

In response, Plaintiff argues that Defendant's criticism of his failure to meet deadlines was not a *legitimate* expectation. In support, he stated that Hendricks did not oversee Plaintiff or set his schedule and she did not remember whether Plaintiff failed to meet deadlines. Plaintiff also stated that he set his own deadline for the survey report and completed the project only three days after the deadline that he had set. He stated that Judy Baker, the individual overseeing the project, had no problem with the brief extension. Plaintiff also contends that the alleged deadline and

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evidence or argument that the communication at issue affected his employment status.

attendance problems are irrelevant for purposes of the legitimate performance expectations analysis, in part because Thompson and Hendricks testified that Plaintiff was terminated from the PSO only for the parking tag incident and not for any performance issues.

On one hand, Plaintiff argues that Defendant terminated him for reasons of performance issues as well as the proffered reason related to the parking tag. On the other hand, Plaintiff contends that any evidence related to attendance and failure to meet deadlines is irrelevant because Hendricks' proffered reason for discharging him was unrelated to his performance. It is undisputed that PSO considered Plaintiff's performance "less than satisfactory" after the first semester. (*See* January 1998 letters from Feuille and LeRoy to Plaintiff.) However, the Court agrees that Hendricks testified that she terminated Plaintiff's assistantship solely because of the parking tag incident. Therefore, the Court will not consider other performance issues at this time.

Regarding the parking tag, Plaintiff apparently argues that the parking tag incident does not constitute a failure to meet legitimate expectations because he acted consistent with Thompson's instructions. He first argues that he did not alter the parking tag; later in the same paragraph, he states that he "included the ILIR lot on the tag" and claims that was consistent with Thompson's instructions. (# 26, pp. 36-37.) He also states that PSO had hang tags that were used to permit individuals to park in lots other than the PSO lot, including the ILIR lot; and Thompson gave Plaintiff the

tag at the beginning of the fall semester and told him he could park anywhere he needed to park, including the ILIR lot, as long as he was on PSO business. In support of his argument that the parking tag incident does not constitute a failure to meet legitimate expectations, Plaintiff also refers to Hendricks' alleged statement that she did not believe the parking tag issue warranted termination.

The evidence is disputed whether Plaintiff altered the tag and if so, whether he did so because Thompson told him he could park in the ILIR lot. Therefore, Plaintiff has raised a question of fact regarding whether he met the PSO's expectations.

b. Similarly-Situated Individuals

Defendant next argues that Plaintiff has failed to establish that a similarly-situated assistantship-holder outside his protected class was treated more favorably.

In his response, Plaintiff addresses this element of the *prima facie* analysis only in terms of his participation in the ILIR program. (*See* # 26, pp. 42-43.) As Plaintiff notes, "a student's performance in an assistantship is entirely distinct from the student's academic status." (# 26, p. 43.) Plaintiff's presentation of evidence related to students who were similarly situated to him in terms of the ILIR program does not constitute evidence of a similarly-situated individual for purposes of his Title VII claim. *See Bio v. Fed'l Express Corp.*, 424 F.3d 593, 596

(7th Cir.2005) ("A similarly situated employee is one who is 'directly comparable to [the plaintiff] in all material respects.' ").

"The failure to establish any one of the initial four elements defeats a discrimination claim." *Id.* at 596-97. Because Plaintiff has failed to provide any evidence of individuals who were similarly situated to him in terms of his assistantship, he has failed to establish a *prima facie* case of racial discrimination related to the termination of his assistantship by the indirect method. Therefore, the Court grants Defendant's motion for summary judgment on his claim of race discrimination in employment.

c. Pretext

Although not necessary to its decision, the Court will also consider the evidence regarding pretext. If a plaintiff establishes a *prima facie* case of discrimination (which the Court assumes for purposes of this discussion), the defendant bears the burden of offering a legitimate, nondiscriminatory reason for the adverse employment action (in this case, terminating Plaintiff's PSO assignment) and showing that it honestly believed those reasons, even if the reasons are foolish, trivial, or baseless. *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 984 (7th Cir.1999). To demonstrate pretext, the plaintiff "must produce" (quoting *King v. Preferred Technical Group*, 166 F.3d 887, 892 (7th Cir.1999)). A pretext for discrimination means "a lie, specifically a phony reason for some action." *Millbrook v. IBP, Inc.*, 280 F.3d 1169,

1175 (7th Cir.2002) (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir.1995)). Pretext is "more than an unusual act; it means something worse than a business error, 'pretext' means deceit used to cover one's tracks." *Id.* (quoting *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir.2001)).

Plaintiff states that he has raised a genuine issue of material fact with regard to whether Defendant's proffered reason for terminating his assistantship was a pretext for race discrimination. In support, he refers generally to the sections of his memorandum on direct evidence in both the assistantship and the ILIR context, similarly-situated individuals, and whether he met PSO's legitimate performance expectations in both contexts, and he provides statistical information about minorities in the ILIR program. Given the standard for establishing pretext, these general references are not very helpful nor do they constitute "significantly probative admissible evidence." *See Jones v. Union Pac. R.R. Co.*, 302 F.3d at 742-43. Thus, Plaintiff has failed to raise a genuine issue of material fact regarding pretext.

C. Analysis Regarding the Title VI Claim (Count IV)

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.

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§ 2000d. The framework for establishing discrimination under Title VI is similar to the method used for Title VII; under Title VI, a plaintiff may prove discrimination by presenting either direct or indirect evidence of discriminatory intent. *See Lerner v. Ravenswood Hosp. Med. Ctr.*, No. 98 C 5389, 1999 WL 1267710, *4 (N.D.Ill. Nov. 10, 1999) (unreported) (citing *Hankins v. Temple Univ.*, 829 F.2d 437, 440-43 (3d Cir.1987) (applying *McDonnell Douglas* method of proof to Title VI case)).

In Count IV, Plaintiff alleges that he was denied the benefits of continued participation in the ILIR master's degree program on the basis of his race. Defendant argues that the Court should grant summary judgment in its favor on this claim because Plaintiff has failed to establish a *prima facie* case of racial discrimination based on either direct or indirect evidence.

1. Direct Evidence

In his discussion of direct evidence, Plaintiff relies on the following evidence: (1) ILIR faculty and PSO employees, including Wallace Hendricks and Peter Feuille, repeatedly referred to the fact that Plaintiff was the "first African American male" to have PSO/ILIR assistantship (Brewer dep., pp. 84-86); (2) Professor Hendricks often told Plaintiff how important it was for Plaintiff to do well on behalf of the Institute and "future ILIR students," which Plaintiff understood to mean "future African American students" (Brewer ex., # 25, p.

12); (3) Plaintiff believed he was subject to extraordinary scrutiny because of his race (Brewer dep., pp. 86-88); and (4) Plaintiff stated that Professor Feuille said he had "ruined it for everyone" and Plaintiff understood that to mean that Feuille was referring to future African-American students (Brewer dep., p. 89). Plaintiff also refers to Paragraphs 59-65 of his additional material facts, which provide evidence regarding grading. Plaintiff does not explain how the facts alleged in those paragraphs constitute direct evidence that Feuille dismissed Plaintiff from the ILIR program based on race.

Plaintiff's assumption that Hendricks and Feuille were referring to African-American's when they talked about future ILIR students is mere speculation and the evidence does not support it. For example, Feuille's letter of April 21, 1998, states as follows:

> The words in this letter cannot fully convey how greatly disappointed, dismayed, and upset we are with your performance. ILIR has worked for many years to establish and maintain a strong relationship with PSO. This relationship has resulted in an annual RA position that has enabled several of your predecessors to obtain the financial aid necessary to pursue a graduate education, as well as provide them with the opportunity to obtain some professionally relevant and valuable work experience. However, with your unacceptable behaviors you have placed this strong relationship in jeopardy, to the possible detriment of the students who will follow you into our program. In short, your work behavior has diminished the reputation of

the Institute and your fellow students.

(Feuille letter to Plaintiff dated April 21, 1998.) Plaintiff has pointed out that he was the first African-American to hold the PSO assistantship, therefore, Feuille's reference to Plaintiff's "predecessors" clearly is not limited to African-Americans. Similarly, there is no indication that Feuille was referring only to African-American students when he referred to "students who will follow" Plaintiff in the ILIR program and PSO assistantship. Plaintiff's speculation does not constitute direct evidence of discriminatory motive.

In his discussion on direct evidence, Plaintiff first states without discussion that the evidence described above, together with other comments, constitutes direct evidence of discrimination. Alternatively, he contends that this evidence could lead a reasonable fact-finder to conclude that the ILIR routinely treated African-Americans as a separate subgroup based on their race. At most, these neutral comments might indicate that ILIR treated African-Americans as a separate subgroup. However, they do not constitute direct evidence that Plaintiff was dismissed from the ILIR program because of his race. *See Phaup*, 761 F.Supp. at 564 (in the Title VII context, concluding that certain benign statements did not constitute direct evidence of discrimination, but might serve as indirect evidence of pretext). Thus, Plaintiff has not presented direct evidence to support his claim of discrimination under Title VI.

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2. Indirect Evidence

To establish a *prima facie* case of race discrimination under Title VI using the indirect method, a plaintiff must show the following: (1) he is a member of a protected class; (2) his performance met the defendant's legitimate expectations; (3) he suffered an adverse action; and (4) the defendant treated other similarly-situated persons outside of the plaintiff's classification more favorably. *Lerner*, 1999 WL 1267710, at *6. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged action. *Id.* Once the defendant does so, the burden of production shifts back to the plaintiff to prove by a preponderance of the evidence that the reason proffered by the defendant is actually a pretext for discrimination. *Id.*

It is undisputed that Plaintiff was a member of a protected class and that he was dismissed from the ILIR master's degree program. Thus, Plaintiff has satisfied the first and third elements. Defendant contends that Plaintiff has failed to satisfy the second and fourth elements and has failed to show that Defendant's proffered reason for dismissing him was pretext. Specifically, Defendant contends that (1) Plaintiff's argument that he met Defendant's legitimate expectations for the master's program fails because his GPA was below the required 3.0 after two semesters; (2) Plaintiff has failed to provide evidence that similarly-situated persons outside his protected class were treated

more favorably; and (3) even if Plaintiff succeeds in establishing a *prima facie* case, he has failed to establish that Defendant's proffered nondiscriminatory reasons for dismissing Plaintiff from the program were a pretext for racial discrimination.

Plaintiff contends that he has presented sufficient evidence to establish the existence of genuine issues of material fact that preclude summary judgment. Specifically, Plaintiff contends that genuine issues of material fact exist as to (1) whether Plaintiff met the legitimate expectations of the ILIR, (2) whether Plaintiff has identified similarly-situated persons outside his class who were treated more favorably, and (3) whether Defendant's proffered reasons for dismissing him from the ILIR program were a pretext for race discrimination.

a. Defendant's Legitimate Expectations

Defendant contends that Plaintiff did not meet the ILIR's legitimate expectations because his GPA of 2.959 after two semesters fell short of the ILIR's requirement of a 3.0 GPA.

Plaintiff's response discusses his excellent qualifications and heavy course load. He states that he was doing quite well academically until the end of the fall semester after Thompson began making disparaging remarks to Denise Hendricks, who is married to Professor Hendricks, an ILIR faculty member. Plaintiff also states that Feuille and Hendricks are close friends.

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Plaintiff asserts that "[i]t is clear that Plaintiff's alleged performance problems at the PSO were communicated repeatedly to ILIR faculty members, and that numerous discussions were had among faculty members and between the Hendricks' [(*sic*)] regarding Plaintiff." Plaintiff also states that the grading process is subjective. He states that Professor LeRoy often grants extensions and does not always assess penalties. He discusses his grades in Professor Martocchio's classes. Plaintiff then states that the ILIR guidelines allow for exceptions to dismissal for students with a GPA less than 3.0. Plaintiff states that his cumulative GPA after two semesters was very close to 3.0 and he has a learning disability. Plaintiff does not explain how this information is related to the issue of whether he met the ILIR's legitimate expectations. Plaintiff also questions the Committee's decision to dismiss him, and states that the Committee improperly considered his PSO assistantship performance in recommending dismissing him.

Based on this recitation, Plaintiff may be attempting to indicate that his grades were sabotaged as a result of the communication between PSO and ILIR faculty. His statement that he was "doing well academically until the end of the fall semester when Thompson began making disparaging remarks about him to Denise Hendricks" (# 26, ¶ 38) implies that Thompson's comments to Denise Hendricks affected the grades that he received from Professors Martocchio and LeRoy for first semester classes. The only evidence that Plaintiff has offered to support this speculation is that

his grades declined as the semester progressed. Martocchio testified that he had no contact whatsoever with anyone at PSO; that a student's assistantship performance would have no effect on his academic status; and that he never heard anything about Plaintiff falsifying a parking tag. (Martocchio dep., pp. 33-34, 37.) Regarding his grades in LeRoy's classes, Plaintiff requested extensions on finals due in two classes for Professor LeRoy. LeRoy allowed the extensions but expressly informed Plaintiff that he would assess a penalty on those finals. Based on this evidence, Plaintiff has failed to show a connection between his grades and communications between ILIR and PSO. It is undisputed that the grading process has a subjective component. Furthermore, university instructors are accorded great deference in evaluating a student's performance. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 n. 11, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). Therefore, the Court concludes that Plaintiff has failed to raise a factual dispute regarding whether any alleged communication between PSO and ILIR affected his grades.

Plaintiff concedes that, at the end of the second semester, his GPA was 2.959. Nevertheless, he appears to contend that the 3.0 GPA requirement was not legitimate *as to him* because he had a learning disability, he was 0.041 from a 3.0 GPA after taking eight courses in two semesters, he had already been offered a prestigious post-graduate job, and he needed to complete only two classes in order to graduate. Thus, Plaintiff's discussion regarding this element appears to challenge the

legitimacy of the GPA requirement. He has not developed this argument, nor has he presented any facts to support it. Although the Court has found no case law addressing the legitimacy of expectations in the Title VI context, the Seventh Circuit's approach to this issue in the Title VII context is helpful. In considering the question of qualifications, the court stated as follows:

> What the qualifications for a position are, even if those qualifications change, is a business decision, one courts should not interfere with. *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir.1986). We do not tell employers what the requirements for a job must be. Given the qualifications which Eagle set out for the position, Gorence simply did not measure up.

(Gorence v. Eagle Food Ctrs., Inc., 242 F.3d 759, 765 (7th Cir.2001)). The Court adopts this approach to the question of the legitimacy of expectations in the Title VI context. Here, the GPA requirement was not inherently discriminatory. Beyond that, the Court will not question the decision of the graduate school or the ILIR to establish a certain GPA as a program requirement for its students.

Plaintiff also seems to be arguing that his professors and the Committee did not exercise discretion in his favor. That is, although he acknowledges that grading is subjective, he seems to believe that his professors should have given him a break when determining grades because he took a heavy load the first semester and because he had a learning disability. Similarly, he seems to indicate that the Committee

should have exercised its discretion in his favor because his GPA was close to the required GPA, because he had a learning disability, because he had already been offered a job, and because he only needed two classes to graduate. However, Plaintiff has provided no evidence showing that the Committee's exercise of discretion in his case was tainted by improper motives.

Here, it is undisputed that the ILIR Handbook states that a student must maintain a GPA of 3.0. After Plaintiff's first semester, his GPA was 2.866. After his second semester, his cumulative GPA was 2.959. Thus, it is undisputed that Plaintiff failed to meet ILIR's legitimate expectations.

b. Whether Plaintiff was Treated Less Favorably Than Similarly-Situated Students

Regarding the fourth element, Plaintiff has presented evidence relating to an Asian-American female student who was dismissed from the ILIR program because her GPA was below 3.0 at the end of two semesters. (Feuille dep., p. 35.) The student appealed the dismissal, and as a result of the appeal, Feuille learned that she had followed incorrect advice from a faculty member. (Feuille dep., p. 34-35.) Because her failure to achieve a 3.0 average in the second semester was the result of a mistake on the part of an ILIR faculty member, Feuille rescinded the dismissal and allowed her to return to the ILIR program. Plaintiff contends that he, like that student, relied on the

mistaken advice of a faculty member—that being Professor LeRoy's approval of his five-unit course load.

Defendant first distinguishes the situation with the Asian-American student because, in that situation, the reversal occurred as the result of the student's appeal. In contrast, Plaintiff failed to appeal his dismissal. In response, Plaintiff states that the fact of the appeal is irrelevant because Feuille testified that he reversed his decision "when the misunderstanding came to his attention." (# 26, p. 49.) Thus, Plaintiff implies that Feuille learned of the mistake separately from the appeal, and the appeal itself was not a necessary element of the reversal. Plaintiff has mischaracterized Professor Feuille's testimony. Feuille expressly testified that he learned about the additional information "because the student raised it in her appeal." (Feuille dep., p. 34.)

Plaintiff also argues that he and the Asian-American student were similarly situated in that they both failed to achieve the required GPA because they relied on the mistaken advice of a faculty member. The Court disagrees. Plaintiff contends that LeRoy's approval of a five-course load was a mistake "not because of Plaintiff's ultimate performance, but because such an arrangement should never be approved." (# 26, p. 49.) This is a reference to LeRoy's testimony that Professor Feuille admonished LeRoy for approving Plaintiff's five-unit course load. LeRoy went on to testify that, as a matter of policy, students are discouraged from signing up for five classes. (LeRoy dep., p. 104, stating that "the consistent message ... is

[that] students take four units, you don't sign them up for five units, you don't approve student requests for five units, and you never approve a plan in which a student is going to graduate from the program in two semesters rather than three.") Professor Feuille also testified that the ILIR handbook discourages students from taking five courses in a semester, but it does not prohibit it; instead, individual advisors determine whether it is appropriate in a given case. (Feuille dep., pp. 28-29.)

Here, however, Plaintiff requested that LeRoy approve a five-unit course load for fall semester as part of his goal to complete the ILIR program in one calendar year. (LeRoy dep., pp. 16-17.) The normal load consists of ten courses taken over a year and a half. A schedule of five units per semester and a schedule allowing completion of the program within a calendar year require the approval of an academic advisor. LeRoy testified that he approved Plaintiff's request to take five courses during the fall semester in order to try to complete the program within a calendar year. He stated:

> I was supportive of it because the vision he painted for me of being a very successful individual, and I saw in our conversations just superficial sorts of indicators that this is a person in whom can you invest this kind of trust and faith that this was an individual for whom we could do this kind of exception to the norm.

(LeRoy dep., pp. 102-3.) Notwithstanding LeRoy's

approval of the five-unit course load, LeRoy did not "advise" Plaintiff to take five courses. Instead, Plaintiff voluntarily chose to take five units. Therefore, unlike the Asian-American student, Plaintiff did not rely on mistaken advice from LeRoy. A similarly-situated individual is one who is "directly comparable to [the plaintiff] in all material respects." *Bio*, 424 F.3d at 596 (quoting *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir.2002)). Here, Plaintiff's decision to take five courses did not constitute reliance on mistaken advice of a faculty member. Thus, Plaintiff has failed to establish that he was situated similarly to the Asian-American student.

Plaintiff also contends that the parking tag incident constituted a situation in which he mistakenly relied on advice from a faculty (or staff) member, and he states that student assistantship issues should not be considered in analyzing whether a student is similarly situated academically. He testified that he told Feuille about the parking tag incident which he contends was a "misunderstanding," *i.e.*, a mistake, presumably by Thompson. The parking tag problem arose at the end of April 1998, long after first semester grades were recorded and near the end of the second semester. Plaintiff has not explained how that incident relates to his grades nor has he presented any supporting evidence. Plaintiff has also failed to present any evidence to support his suggestion that the parking tag incident influenced Feuille's decision to dismiss him from the ILIR program. Professor Feuille made the final decision to dismiss Plaintiff from the ILIR program.

Although Feuille clearly knew about the problems with Plaintiff's performance at the PSO and knew that Denise Hendricks had terminated Plaintiff's work assignment at PSO, Feuille has stated that he considered only Plaintiff's GPA when deciding to dismiss Plaintiff from the program. During his deposition, Feuille was asked whether he considered Plaintiff's dismissal from the PSO in making the decision. He responded as follows:

> No. He was below 3.0, and the-I mean, it was, again, he had been told, all right, you got to get your cumulative GPA up to this particular level. He didn't. And he had been told what the consequence would be if he didn't. And it was a very straightforward decision made on that basis.

(Feuille dep., p. 42.) Plaintiff has failed to present any evidence that raises a issue of fact on this issue.

Plaintiff has presented evidence about one student who was allowed to return to the ILIR program after having been dismissed for failure to achieve the required GPA. For the reasons described above, the Court concluded that this student was not similarly situated to Plaintiff. Accordingly, Plaintiff has failed to present evidence that he was treated less favorably than a similarly-situated individual outside of his protected group. Because Plaintiff has failed to establish all the elements of a *prima facie* case on his Title VI claim, the Court grants summary judgment in favor of Defendant. *See Bio*, 424 F.3d at 596 ("The failure to establish any one of the initial four elements defeats a discrimination claim.")

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c. Pretext

Although not necessary to its decision, the Court will consider briefly the issue of pretext. Plaintiff argues that he has raised factual issues with regard to whether Defendant's proffered reason for dismissing him from the ILIR program was a pretext for race discrimination. In his discussion, he refers generally to his arguments regarding direct evidence of discrimination in both the assistantship and the ILIR context, similarly-situated individuals, and whether he met PSO's legitimate performance expectations in both contexts. As the Court has noted, these general references are not very useful for understanding Plaintiff's argument.

In addition, Plaintiff states that approximately fifteen percent of ILIR students are underrepresented minorities, including African-Americans. He states that six students have been dismissed from the ILIR program in eleven years, including one Asian student, one Asian-American student, two Caucasian students, and three African-American students, including Plaintiff. Plaintiff contends that those statistics suggest a predisposition on the part of the ILIR to exercise discretion in favor of non-African-Americans. Plaintiff also states that one Caucasian student stopped showing up for classes after two weeks and did not show up for his assistantship but was subsequently allowed to enroll in the executive MBA program and obtain his MBA. Plaintiff contrasts

this with an African-American student who was dismissed from the ILIR program after one semester when he received a grade of C in four of his classes. Plaintiff states that these facts suggest that African-American students in ILIR were subject to disparate treatment.

Professor Feuille, who made the decision to dismiss Plaintiff, asserts that he did so because Plaintiff's grades did not satisfy ILIR's standards. To demonstrate pretext, a plaintiff "must produce 'significantly probative admissible evidence' from which the trier of fact could infer that the [decision-maker's] reason was false and that the actual reason [for the challenged action] was discriminatory." *Jones*, 302 F.3d at 742-43 (quoting *King*, 166 F.3d at 892). Because the evidence offered by Plaintiff, construed in his favor, does not suggest that Feuille's reason was a pretext for discrimination, Plaintiff has failed to create a genuine issue of fact as to pretext. Accordingly, the Court grants summary judgment in Defendant's favor on Plaintiff's Title VI claim.

D. Analysis Regarding the Retaliation Claim (Count IV)

Plaintiff's claim in Count V alleges that he was subject to adverse actions, including, but not limited to, denial of a previously-approved waiver for a "Research Methods" class, refusal by Professor LeRoy to supervise Plaintiff's independent study in employment law to

which LeRoy had previously agreed, and dismissal from the ILIR master's degree program on June 18, 1998. Plaintiff alleges that Defendant did these things in retaliation for his complaints to Ron Bacevich, a Labor Relations Specialist in the PSO, and Denise Hendricks regarding discrimination that preceded or occurred in connection with his discharge from the PSO.

As an initial matter, Plaintiff's claim of retaliation is based on the premise that he complained of racial discrimination to Ronald Bacevich and Denise Hendricks, not that he filed a charge of discrimination with the EEOC. Although the Court cannot consider the statements in Mr. Bacevich's affidavit as supporting the truth of the matter asserted in those statements, they do provide evidence that Plaintiff complained to Mr. Bacevich about what he perceived to be discriminatory conduct.

In previously-filed documents, Plaintiff has indicated that the retaliation claim in Count V is based on Title VII, which addresses discrimination in employment. This is consistent with Plaintiff's prayer for relief in Count V, which seeks back pay, front pay, and other compensatory damages related to employment. A plaintiff may prove retaliation in violation of Title VII by either the direct or indirect method. Under the direct method, a plaintiff must provide direct evidence that he engaged in protected activity and, as a result, suffered the adverse employment action of which he complains. *Hottenroth v. Vill. of Slinger*, 388 F.3d 1015, 1028 (7th Cir.2004). In a

retaliation claim, the direct method essentially requires direct evidence that, if believed by the trier of fact would prove discrimination without reliance on inference or presumption. *Hottenroth,* 388 F.3d at 1028. Because such admissions are rarely made or encountered, the direct method also allows circumstantial evidence to be introduced that would allow "a jury to infer intentional discrimination by the decision-maker." *Hottenroth,* 388 F.3d at 1028 (citing *Rogers v. City of Chicago,* 320 F.3d 748, 753 (7th Cir.2003)).

Alternatively, under the indirect method, the *McDonnell Douglas* burden-shifting test applies to a Title VII retaliation claim just as it does to a racial discrimination claim. *Hunt-Golliday v. Metro. Water Reclamation Dist.,* 104 F.3d 1004, 1014 (7th Cir.1997). Using this method, a plaintiff may establish a *prima facie* case by showing as follows: (1) he engaged in a statutorily-protected activity; (2) he was performing his job satisfactorily at the time of the adverse employment action; (3) he suffered an adverse employment action; and (4) similarly-situated employees who did not engage in protected activity were treated more favorably than he was. *See Stone v. City of Indianapolis Pub. Utils. Div.,* 281 F.3d 640, 643-44 (7th Cir.2002). Once the plaintiff has established a *prima facie* case, the employer can rebut the inference of discrimination by presenting evidence that the adverse action occurred because of a legitimate nondiscriminatory reason, at which time the burden shifts back to the plaintiff to show pretext. *Id.* This framework for analysis was developed to clarify the *McDonnell Douglas* burden-shifting framework, and

it eliminates the need for a plaintiff to show a causal link between a protected activity and an adverse employment action. *Hottenroth,* 388 F.3d at 1028 (citing *Rogers,* 320 F.3d at 755).

Defendant argues that Plaintiff cannot prove retaliation using direct evidence because he cannot prove any discrimination at all. Therefore, he could not have engaged in protected activity by allegedly reporting discrimination. Defendant has provided no case law to support this premise. Furthermore, "an actual violation ... by the employer is not a prerequisite for a retaliation claim; the employee need only have a sincere and reasonable belief that she is challenging conduct that violates Title VII." *Hunt-Golliday,* 104 F.3d at 1014. Therefore, Plaintiff's retaliation claim does not depend on the underlying complaints of discrimination being meritorious. Nevertheless, Plaintiff does not argue that he has presented direct evidence of retaliation.

Defendant also contends that Plaintiff cannot establish discrimination by the indirect method because Plaintiff was not performing satisfactorily at the time the alleged adverse actions were taken and he has failed to point out any similarly-situated employees who did not complain of discrimination who were treated more favorably. In addition, Defendant contends that Plaintiff has failed to establish the existence of a causal relationship because the decisions related to the alleged adverse actions occurred before Plaintiff filed his complaint with the EEOC. The Court notes that the

Seventh Circuit no longer requires the plaintiff to show a causal link. *See Hottenroth,* 388 F.3d at 1028 (citing *Rogers,* 320 F.3d at 755).

The parties disagree as to whether Plaintiff was performing satisfactorily in his assistantship. However, the Court need not address that element because Plaintiff's failure to establish the third and fourth elements of a *prima facie* case dispose of this claim.

Regarding the third element of a *prima facie* case, the alleged retaliatory conduct enumerated in Count V included denial of participation in classes and independent study related to the master's degree program, and dismissal from that program. None of this conduct is related to Plaintiff's employment. An adverse employment action is one that involves "a quantitative or qualitative change in the terms or conditions of employment." *Haywood v. Lucent Tech., Inc.,* 323 F.3d 524, 532 (7th Cir.2003). In his complaint, Plaintiff alleged that the adverse actions that occurred in retaliation for his complaints of discrimination were not limited to the enumerated items in Count V. In a separate section of Plaintiff's response, he also contends that the communications between PSO and ILIR constituted adverse actions. However, Plaintiff has not presented any evidence or argument that the communications affected his assistantship. Thus, the communications do not constitute adverse employment actions. Other than this, Plaintiff has not presented evidence or argument regarding any other adverse actions *related to his employment* at the PSO that occurred

as a result of his complaints to Bacevich or Hendricks regarding the alleged discrimination.

Regarding the fourth element, Defendant argues that Plaintiff has failed to establish that a similarly-situated individual outside his protected class was treated more favorably. In his response, Plaintiff addresses this factor only in terms of his participation in the ILIR program. (*See* # 26, pp. 42-43.) Plaintiff's presentation of evidence related to students who were similarly situated to him in terms of the ILIR program does not constitute evidence of a similarly-situated individual for purposes of the Title VII employment claim.

"The failure to establish any one of the initial four elements defeats a discrimination claim." *Bio,* 424 F.3d 593, 596-97. Because Plaintiff has failed to provide any evidence of conduct that constitutes an adverse *employment* action that occurred in retaliation for his complaints of racial discrimination, or evidence of individuals who were similarly situated to him in terms of his employment, he has failed to establish a *prima facie* case of racial discrimination related to the termination of his assistantship by the indirect method. Accordingly, the Court grants Defendant's motion for summary judgment as to Count V.

V. Summary

For the reasons stated above, the Court **GRANTS**

Appendix B

Defendant's Motion for Summary Judgment **(# 24)**. This case is terminated.

(2)

FILED
JUL 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1694

IN THE
SUPREME COURT OF THE UNITED STATES

LONNELL BREWER,

Petitioner

v.

BOARD OF TRUSTEES OF THE
UNIVERSITY OF ILLINOIS

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

Brief For Respondent In Opposition To Petition

James C. Kearns
Heyl, Royster, Voelker & Allen
102 E. Main Street, Suite 300
Urbana, IL 61801
(217) 344-0060
Counsel for Respondent

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's entry of summary judgment denying a student assistant's Title VII race discrimination claim where the undisputed facts in the record showed the decision-maker's decision to terminate the student's assistantship because of misconduct was made after she conducted an independent investigation and concluded the student had dishonestly altered a parking tag and there was no evidence she was biased against the student because of his race.

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The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 479 F.3d 908. The opinion of the district court (Pet. 38a-104a) is reported at 407 F.Supp.2d 946.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2007. This Court has jurisdiction pursuant to 28 U.S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), provides:

It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin[.]

Section 703(m) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or

national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

INTRODUCTION

Petitioner presents no compelling reason for his Petition for a Writ of *Certiorari* ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioner fails to demonstrate that the Seventh Circuit's March 21, 2007 Order ("Order") is in conflict with a decision of this Court or another Court of Appeals, or that the Seventh Circuit decided an important federal question that has not already been settled by this Court. *See id.* at 10(a)-(c). The Petition should therefore be denied.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

I. Background

Petitioner, an African-American, enrolled in the University's Institute of Labor and Industrial Relations (ILIR) master's degree program in August 1997. (App. at 44a). In addition to his class load for the ILIR program, Petitioner worked approximately ten hours at an assistantship in the University's Personnel Services Office ("PSO"). (App. at 44a, 51a).

Denise Hendricks ("Hendricks") was director of the PSO and Kerrin Thompson ("Thompson") was a special assistant to Hendricks. (App. at 51a). Thompson was Petitioner's supervisor only in terms of his hours and overall assignments; however, other people supervised Petitioner's work on particular projects. (App. at 51a).

On the first day of his assistantship, Thompson met with Petitioner and they discussed the requirements of the assistantship, including projects he would be working on, his schedule, and the form of dress expected. (App. at 3a). Thompson also gave Brewer a temporary parking tag, while explaining he "could pretty much park anywhere at the PSO as long as [he] had [his] tag on [his] mirror." (App. at 4a). Without having any permission to do so, Petitioner altered the parking tag, writing "the C8 lot permission on the tag himself." (App. at 10a). The "C8" designation referred to the ILIR, and not the PSO, lot. (App. at 10a).[1] The PSO lot was adjacent to the PSO building, whereas the ILIR lot was approximately six blocks from the PSO building.

During the fall semester, Petitioner worked primarily on one assignment. (App. at 52a). When he was unable to complete the project by his own self-imposed deadline, he contacted supervisor Judy Baker to request an extension. *Id.* While Baker granted an extension, she also told Petitioner that Thompson and Hendricks wanted to talk with him. *Id.* Both Thompson and Hendricks talked to Petitioner about the missed

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[1] On page 7 of his Brief, Petitioner implies that the parking tag given to him by Thompson "purported to grant permission to park in either lot." In fact, it was only after Petitioner himself altered the parking tag without permission that the tag purported to grant such permission.

deadline. *Id.* [2]

In early 1998, Petitioner received a parking ticket because the tag he was using broke and fell off of his rear view mirror. (App. at 10a). Petitioner took the tag to University Parking Services for a replacement. (App. at 10a). The Parking Services' clerk discovered the altered tag, and that the tag contained inaccurate information. (App. at 10a, 54a).

Parking Services subsequently called Thompson to express concern that the tag contained two lot numbers, only one of which it had authorized. (App. at 54a). Thompson told Hendricks what Parking Services told her: (1) that Petitioner had taken his tag to Parking Services to get it replaced; (2) Parking Services saw that it had been marked to add another parking lot in addition to the lot that was printed on the hang tag; and (3) that Parking Services then contacted the PSO to find out why the Petitioner's tag listed two parking lots. (App. at 54a, 57a).

Following this discussion with Thompson, Hendricks herself inspected the tag and verified the addition of the C8 lot number on the tag. (App. at 12a). After this independent investigation, Hendricks decided to terminate Petitioner's assistantship one month early because he had altered the parking tag. (App. at 12a, 57a). Hendricks was the only person that participated in the termination decision; she did not

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[2] Petitioner suggests on page 7 of his brief that "Thompson jeopardized [his] employment by trumpeting to Ms. Hendricks the fact that [he] had missed an important deadline..." In fact, Petitioner testified that "I went to [Thompson] and I believe [Hendricks] both and let them know that I would need a little more time..."

talk to Thompson about whether to discharge Petitioner. (App. at 58a).

Thompson and Petitioner discussed the parking tag alteration the following day. (App. at 11a, 54a-55a). According to Petitioner, Thompson was "irate" because he had altered the parking tag. (App. at 55a). When Petitioner orally "pushed back" Thompson purportedly "mumbled a couple things". (App. at 55a). Continuing in his retort, Petitioner said he "d[id] not have to take this and started to walk off." (App. at 55a). Petitioner did not "even remember exactly what else [Thompson] said", but nonetheless recalled that Thompson said "I am through with you people" (App. at 55a) and referred to Petitioner with a racial epithet. (App. at 11a; Brewer Dep. Ex. 14 at 16-17).

Following the conversation with Thompson, Petitioner spoke with Hendricks. (App. at 11a). Hendricks told Petitioner that "I and I alone have decided to terminate [your] assistantship." (App. at 11a). Petitioner told Hendricks that he "underst[ood] that what [he] did was wrong." (App. at 56a). He also told Hendricks that Thompson gave him permission to park in the ILIR (C8) lot and that Thompson could not be trusted to confirm this because she was racist. (App. at 12a). Hendricks responded that Petitioner "admitted to altering the temporary parking tag, so [she] did not need to know much more." (App. at 56a). Hendricks further explained that although the parking issue did not merit termination in the abstract, someone needed to be fired to preserve the special relationship between the PSO and Parking Services. (App. at 11a).[3]

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[3] Although the University disputes many of Petitioner's factual allegations, it recognizes the Court is required to view all facts and draw all reasonable inferences in favor of the

REASONS FOR DENYING THE PETITION

I. The courts of appeal are not in genuine conflict on the issue of intermediate supervisor liability.

Petitioner contends there is a conflict among the courts of appeals concerning the appropriate standard for intermediate supervisor liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. To support his argument, Petitioner attempts to create a conflict that does not truly exist through the artful selection of language from some cases, while overlooking and disregarding language from the same or other cases within the same jurisdiction. A thorough analysis shows there is no actual conflict among the circuits regarding the standard applied for determining employer liability for a supervisor's discriminatory animus.

This Court, in fact, generally addressed the issue of employer liability for supervisor conduct in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998), a case involving sexual harassment. There, the Court noted that because "the term 'employer' is defined under Title VII to include 'agents'. . . Congress has directed federal courts to interpret Title VII based on agency principles." 524 U.S. at 755. Guided by Restatement (Agency) § 219(2)(d), this Court looked to the "aided in the agency relation standard" and found it requires "something more than the employment relation itself." 524 U.S. 760. The Court found this approach was consistent with "[e]very Federal Court of Appeals to have considered the question" and which "has

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nonmoving party when considering a motion for summary judgment. Except where otherwise indicated, the University therefore will not identify those instances where Mr. Brewer's allegations are disputed by the University.

found vicarious liability when a discriminatory act *results* in a tangible employment action". *Id.* at 760 (emphasis added). Noting that "few courts have elaborated how agency principles support this rule," the Court went on to conclude that it "reflects a correct application of the aided in agency relation standard." *Id.* In further support of its conclusion, the Court cited with approval, the Seventh Circuit "cat's paw" decision of *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (C.A. 7 1990). *Ellerth*, 524 U.S. at 762.

While the lower appellate courts have not always expressed the applicable test in terms of an "aided in agency relation" or "results in" standard, synonymous language, such as "cause" or "influence" has been used. And, irrespective of whether the courts use the terms "cause" or "influence", the determinative issue has been the same - did an act of an unlawfully biased supervisory employee *result in* a tangible employment action.[4] Although Petitioner contends the appellate courts have utilized different standards, the following analysis shows a "results in" approach has been uniformly applied.

For example, in *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 285 (C.A.3 2001), the district court in granting summary judgment relied heavily on the fact that there was no evidence the ultimate decision-maker was biased against the plaintiff. The Third Circuit reversed the district court because, *inter alia*, the decision-maker had asked for, and was provided with, information and recommendations

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[4] The term "cause" is defined to mean "a person that acts ... so as to produce a specific result." WEBSTER'S COLLEGE DICTIONARY 208 (2nd ed. 1998). Similarly, the term "influence" means "to move or impel (a person) to some action." *Id.* at 670.

from biased individuals that "played a role in the ultimate decision to terminate" the plaintiff. *Id.* at 285-86. *See also Delli Santi v. CNA Ins. Co.*, 88 F.3d 192, 201 (C.A.3 1996)(affirming jury verdict because it could have rationally inferred that decision-makers were not the effective decision-makers and that decision to fire plaintiff was influenced by biased supervisors).

A similar "results in" approach was followed by the Fifth Circuit in *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (C.A.5 2000). There, a supervisory non-decision-maker's bias was imputed to the employer because a jury could find the supervisor was "principally responsible" for the plaintiff's termination. *Id.* at 226 (*citing Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). The court "look[ed] to who actually made the decision or *caused* the decision to be made" and whether there was evidence that the supervisor "possessed leverage, or exerted influence, over the titular decision-maker." *Id.* at 227 (emphasis added). Because there was evidence that the non-decision-maker "was the *actual* decision-maker behind [the plaintiff's] firing", the court reversed the district court's entry of judgment as a matter of law. *Id.* at 227, 228 (*citing Reeves*, 120 S.Ct. at 2111)(emphasis in original). *See also Laxton v. Gap Inc.*, 333 F.3d 572, 584 (C.A.5 2003)(finding non-decision-maker supervisor's biased statement could be evidence of discrimination where supervisor issued first warning and was the primary source of information for the second warning and both warnings were considered in determining plaintiff would be terminated under the defendant's "three-strikes-you're-out policy).

The Sixth Circuit is likewise in accord with the "results in" standard. In *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (C.A.6 2001) a shopper accused the defendant of racial discrimination. The court noted that in the employment

context, imputation of a supervisor's animus to the employer could occur when there was evidence the animus was "the cause of the termination or somehow influenced the ultimate decision-maker." *Id.* at 877. Citing *Shager*, 913 F.2d 398 and *Wilson v. Stroh Cos.*, 952 F.2d 942 (C.A. 6 1992), the court described the standard as having a "causal nexus requirement" and found the determinative question was whether there was evidence that "racial animus was the cause of the termination." *Christian*, 252 F.3d at 877-78. Because, "like *Shager*, there [was] evidence that the decisonmaker 'acted as the conduit of the [employee's] prejudice - [her] cat's paw - and that the employee's 'influence may well have been decisive'", the court reversed the district court's grant of summary judgment. *Id.* at 878 (*quoting Shager*, 913 F.2d at 405). *See also Wells v. New Cherokee Corp.*, 58 F.3d 233, 237-238 (C.A.6 1995)(holding employer was liable for non-decision-maker supervisor's animus because he was "meaningfully involved in the decision to terminate an employee", worked closely together and consulted with the decision-maker on employment decisions and acted jointly with the decision-maker in deciding to terminate the plaintiff's employment).

In the Eighth Circuit, vicarious liability for the conduct of a non-decision-maker supervisor has been found where such supervisor "participated in the decisions to suspend and terminate" the plaintiff and there was evidence that the decision-maker was not the "sole relevant decision-maker." *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1323 (C.A.8 1994). *See also Lacks v. Ferguson Reorganized School District R-2,* 147 F.3d 718 (C.A.8 1998)(refusing to find employer liability because there was no evidence the decision-makers were a cat's paw; the biased supervisors did not recommend termination and the decision-makers did not defer to the opinion or judgment of the biased supervisors), *cert. denied*, 526 U.S. 1012 (1998); *Beshears v. Asbill*, 930 F.2d 1348, 1354 (C.A.8 1991)(finding evidence of discrimination

where individuals *responsible* for employments decisions made age-related comments); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1060 (C.A.8 1993)(reasonable jury could have found that biased supervisor used investigator and decision-maker committee as the conduit of his prejudice - "his cat's paw", *citing Shager*, 913 F.2d at 405).

Despite Petitioner's arguments to the contrary, the Ninth Circuit has *not* "taken a different approach altogether" and there is no "discrepancy in the approach[s]" taken in the Ninth Circuit cases cited by Petitioner. *See* Pet. Brief, page 21. In the context of retaliation claims, both *Bergene v. Salt River Project Agr. Improvement and Power Dist.*, 272 F.3d 1136 (C.A.9 2001) and *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061 (C.A.9 2003) have required, as part of a *prima facie* case of retaliation, proof of a causal link between the protected activity and the employer's action. *Bergene*, 272 F.3d at 1141; *Stegall*, 350 F.3d at 1066. And, both courts found such proof when a biased supervisor was involved, and played an influential role, in the employment decision. *Bergene*, 272 F.3d at 1141; *Stegall*, 350 F.3d at 1070 (biased supervisor was adamant to management that plaintiff be fired).

Petitioner erroneously suggests the Eleventh Circuit requires more than "influence" or "causation", citing to *Llampallas v. Mini-Circuits Lab Inc.*, 163 F.3d 1236 (C.A.11 1998), *cert. denied*, 528 U.S. 930 (1999) and *McShane v. Gonzales*, 144 Fed. Appx. 779 (C.A.11 2005). In *Llampallas*, the plaintiff's employment was terminated by a decision-maker and the alleged harasser was a non-decision-maker supervisor. Liability depended upon whether there was evidence the supervisor's "discriminatory animus caused [the decision-maker] to terminate" the plaintiff's employment. 163 F.3d at 1248. The court recognized the causal chain would be broken if the decision-maker "herself evaluat[ed] the employee's situation." *Id.* at 1249 (*citing Shager*, 913 F.2d at 405).

The Eleventh Circuit in *McShane* did not hold, as Petitioner suggests, that "causation is not always enough". Relying on *Llampallas*, that court merely held the causal link could be broken if "the actual decision-maker himself evaluat[es] the employee's situation." *McShane*, 144 F.3d Appx. at 791. *See also Roberts v. Randstad North America, Inc.*, 2007 WL 1433777, p. 5-6 (C.A.11 May 16, 2007)(no liability for non-decision-maker supervisory conduct because decision-maker conducted an independent analysis).

The approach utilized by the District of Columbia Court of Appeals is in accord with the other Circuits. That court in *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. 1998) "join[ed] at least four other circuits", including the Third, Sixth, Seventh, and Eighth Circuit Court of Appeals, in holding "a subordinate's bias relevant" to the discrimination issue under the facts of the case. *Id.* at 1312. There, the biased supervisor was the formal decision-maker's chief source of information, repeatedly urged the decision-maker to terminate the plaintiff, was given the responsibility for training, testing, and evaluating the plaintiff, and was in contact with the decision-maker at every step in the decision-making process. *Id.* at 1311. The decision-maker's dependence on the biased supervisor was heightened by her inability to independently assess the plaintiff's proficiency. Under these facts the court concluded a jury could find the biased supervisor used the decision-maker as a conduit of his prejudice. *Id.*

Petitioner's argument that *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (C.A.4 2004) creates a different standard requiring that "the biased *intermediate supervisor* must take on the persona of the 'functional' or 'actual' decision-maker" (*See* Pet. Brief, page 17) misinterprets that decision. The court in *Hill* repeatedly stated that the allegedly biased person was a safety inspector with *no supervisory or disciplinary authority* over the plaintiff. *See,*

e.g., Hill, 354 F.3d at 282 ("the inspector had no supervisory authority over the mechanics, nor any authority to discipline"); *Id.* at 291 (safety inspector "held no formal disciplinary or supervisory authority over Hill"); *Id.* at 298 (inspector "possessed no supervisory or disciplinary authority over Hill"). Under those facts, the Fourth Circuit "decline[d] to endorse a construction of the discrimination statutes that would allow a biased subordinate who has *no supervisory or disciplinary authority* and who does not make the final or formal employment decision to become a decision-maker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one in the adverse employment decision." *Id.* at 291 (emphasis added). The court went on to affirm summary judgment because the non-biased decsion-makers made an independent investigation of the allegedly biased employee's safety inspection reports and made an independent non-biased decision to terminate the plaintiff. *Id.* at 293-297.

Although Petitioner expressly recognized that employer liability for supervisory and non-supervisory employees may be different because "this [the Brewer] case does not involve the thornier issues of whether and to what extent an employer may be held liable for the discriminatory acts of its non-supervisory employees," he fails to acknowledge that *Hill* is distinguishable on that very ground (*See* Pet. Brief, page 16, fn 10). Petitioner's reliance on *Hill* to create a conflict among the circuits on the issue of vicarious liability for acts of *supervisory* employees is therefore misplaced. In any event, it is clear that the court in *Hill* applied a "results in" approach to employer liability for non-supervisory bias.

The University concedes that the Tenth Circuit Court of Appeals has suggested there is a divide "as to the level of control a biased subordinate must exert over the employment decision" before liability will be found. *Equal Employment*

Opportunity Commission v. BCI Coca-Cola Bottling Company of Los Angeles, 450 F.3d 476, 486 (C.A.10 2006). In *BCI*, the Tenth Circuit stated the Fifth and Seventh Circuit had adopted a "lenient" approach that was at the opposite extreme of the Fourth Circuit's decision in *Hill*. *Id.* at 486. The *BCI* court further suggested that the circuits following this "approach" "improperly eliminate[] a requirement of causation" and impose liability "even where an employer has diligently conducted an independent investigation." *Id.*

The *BCI* court's suggestion that the Fifth Circuit adopted a "lenient" approach in *Russell*, thereby "eliminating a requirement of causation", *BCI*, 450 F.3d at 486, is debatable because the court in *Russell* expressly recognized that it "look[s] to who actually made the decision or *caused* the decision to be made" when determining employer liability for a non-decision-maker supervisor's conduct. *Russell*, 235 F.3d at 227.[5] Citing *Reeves*, the Fifth Circuit affirmed the jury's verdict because it could find the biased supervisor "contributed significantly to the termination decision" and "was "principally responsible for [the plaintiff's] firing." *Id.* at 228.

Equally debatable is the *BCI* court's suggestion that the Fifth and Seventh Circuit's purported adoption of such "lenient" approach improperly "impose[s] liability even where an employer has diligently conducted an independent investigation." These circuits both recognize that a decision-maker's independent investigation breaks any causal link

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[5] The Seventh Circuit has likewise consistently and routinely utilized a causation analysis in determining employer liability for a biased supervisor's conduct. *Shager*, 913 F.2d at 405; *Hunt v. City of Markham, Ill.*, 219 F.3d 649 (C.A.7 2000); *Rozskowiak v. Village of Arlington Heights*, 415 F.3d 608 (C.A.7 2005); *Brewer* (App. at 27a-29a).

between a biased supervisor's conduct and the adverse employment decision. *Long v. Eastfield Coll.*, 88 F.3d 300, 306-07 (C.A. 5 1996); *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 730 (C.A.7 2004); *Wills v. Marion County Auditor's Office*, 118 F.3d 542, 547-48 (C.A.7 1997).

The *BCI* court's further suggestion that the Fifth Circuit's decision in *Russell*, and the Fourth Circuit's decision in *Hill* are at opposite ends of the spectrum is also questionable. *BCI*, 450 F.3d at 486-87. Both of the courts in *Hill* and *Russell* rely on this Court's decision in *Reeves* and both hold the determinative issue is whether there is evidence that the biased subordinate was "principally responsible" for the employment decision. *Russell*, 235 F.3d at 226, 228; *Hill*, 354 F.3d at 291.

While some lower appellate courts have construed the *BCI* decision as creating yet another standard, *see Foroozesh v. Lockheed Martin Operations Support, Inc.*, 2006 WL 2924789 (W.D. Pa. October 10, 2006) and *Harding v. Cianbro Corp.*, 2007 WL 1290910 (D. Me. May 2, 2007), the *BCI* court merely recognized the standard that has been expressly or implictly stated by the courts before it - whether the biased supervisor's "actions caused [or resulted in] the adverse employment action". *BCI*, 450 F.3d at 487 (*citing Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (C.A.7 2004). In fact, the Tenth Circuit subsequently utilized the "cat's paw" causal analysis in *Young v. Dillon Companies, Inc.*, 468 F.3d 1243, 1253 (C.A.10 2006) when it noted that a biased investigator can issue reports and recommendations and "thereby cause decision makers who rely on those reports to fire an employee unlawfully - a situation in which the biased investigator uses the supervisor as a cat's paw to effect his or her own biased designs."

The Seventh Circuit's analysis is consistent with the "results in" approach utilized by this Court and its sister

circuits. In what has been described as a seminal case, the Seventh Circuit, in *Shager*, described the "cat's paw" theory. 913 F.2d at 405. There, the evidence showed the biased supervisor assigned the plaintiff an unpromising sales territory and portrayed his performance to the decision-making committee in the worst possible light. Applying agency principles, the court noted that if the committee fired the plaintiff for "reasons untainted by any prejudice" of the biased supervisor, the *"causal* link" between the prejudice and the employment action would be broke. *Id.* (emphasis added). The court concluded summary judgment could not be sustained because the supervisor's influence may have been decisive and the committee's deliberations were perfunctory. *Id.*

The "results in" or "causal link" approach in *Shager* has been consistently followed by the Seventh Circuit. In *Hunt v. City of Markham, Ill.*, 219 F.3d 649 (C.A.7 2000), the issue was whether there was evidence of discrimination when a biased black mayor made employment related recommendations to the unbiased decision-making city council. The court concluded it was possible to infer from the evidence of the mayor's recommendations that the decision-makers were influenced by unlawful discrimination in making their adverse employment decisions. *Id.* at 652.

The Seventh Circuit again recognized the need for a causal link in *Rozskowiak v. Village of Arlington Heights*, 415 F.3d 608 (C.A.7 2005), stating "[d]iscriminatory remarks are actionable only if they injure the plaintiff; 'there must be a real link between the bigotry and an adverse employment action.'" *Id.* at 612 (*quoting Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 762 (C.A.7 2001)). Unlike the facts in *Hunt*, there was no causal link between the discriminatory statements made by the allegedly biased police commander and the adverse employment action. The biased commander was one of a seven member Command Staff that advised the decision-maker

Chief by consensus. There were several occasions when the Command Staff did not adopt the biased commander's recommendations and there was no evidence that the decision-maker Chief met alone with the biased commander to discuss the plaintiff. Under these facts, the Seventh Circuit distinguished *Hunt,* noting the commander "did not have the singular influence over decision makers that the mayor in *Hunt* had..." *Id.* at 613.

The causal approach was again followed by the Seventh Circuit's decision in *Brewer*, wherein it concluded there is no causal link between a supervisor's bias and an adverse employment action when the decision-maker's decision was made after an independent investigation. (App. at 25a-26a). In particular, the court in *Brewer* recognized that an employer will not be liable when the decision-maker "is not wholly dependent on a single source of information [from the biased supervisor], but instead conducts its own investigation into the facts relevant to the decision." (App. at 23a). In such case, "the employer is not liable for [a biased supervisor's] submission of information to the decision-maker." *Id.*

In reaching its conclusion, the court discussed *dicta* from other Seventh Circuit cases noting "our approach to Title VII cases involving an employee's influence over a decision-maker has not always been completely clear." (App. at 26a) It concluded that:

> Even if we were to assume that a lesser degree of influence over an employment decision might trigger Title VII liability in other contexts, such as the context of a regularized, formal performance evaluation, we do not think that such an approach can affect the outcome in a case like this that concerns an employee's discipline for particular misconduct. *The line of*

> *cases addressing this particular situation is univocal, and indicates that even where a biased employee may have leveled false charges of misconduct against the plaintiff, the employer does not face Title VII liability so long as the decision maker independently investigates the claims before acting.*

(App. at 27a)(emphasis added).

In his attempt to create a conflict out of the *Brewer* decision, Petitioner places significant focus on the court's use of the phrases "singular influence" and "functional decision-maker". Petitioner erroneously contends "the Seventh Circuit's articulation of a 'singular influence' test differs from the standards expressed by the majority of courts because it rejects liability even when a biased intermediate supervisor directly influenced or effectively caused an adverse employment decision." *See* Pet. Brief, page 16. Petitioner fails, however, to consider the *Brewer* court's further explanation of a "functional decision-maker", which exemplifies an "influence" or "causation" approach:

> A good example of such degree of influence...is where the party nominally responsible for a decision is, by virtue of her role in the company, totally dependent on another employee to supply the information on which to base that decision. In such a case the employee that selects, colors and supplies the information has such power over the nominal decision-maker that she is in fact the true, functional decision-maker.

(App. at 22a). Further evidence of the *Brewer* court's causal approach is its citation to *Little v. Ill. Dept. of Revenue*, 369

F.3d 1007, 1015 (C.A.7 2004) for the proposition that a employee must possess so much influence "as to basically be herself the true 'functional...decision-maker'". The Seventh Circuit's decision in *Little* makes clear that a "functional decision-maker" is an employee that was responsible for, or caused, the employment action. 369 F.3d at 1015 (*citing* and *quoting Rogers v. City of Chicago*, 320 F.3d 748, 750, 754 (C.A.7 2003)(stating that "[a] decision-maker is the person responsible for the contested decision"); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (C.A.7 1997)(reasoning that a formally subordinate employee should be treated as the decision-maker where he "is the real cause of the adverse employment action"); *see also Hill*, 354 F.3d at 291 (holding that a decision-maker is "the one principally responsible for the decision or the actual decision-maker for the employer")).

Petitioner further ignores the fact that the *Brewer* court's analysis was premised on the question of whether allegedly biased supervisor had the "'singular influence' *required by Rozkowiak.*" (App. at 22a) (emphasis added). As reflected above, the court in *Rozkowiak* required an unbroken chain of causation between the biased supervisor's act and the adverse employment action. *Rozkowiak*, 415 F.3d at 612 ("there must be a real link between the bigotry and the adverse employment action"). The court in *Rozkowiak* recognized there was no causal link when the biased supervisor was one of a seven member committee that voted by consensus and *Brewer* likewise recognized there was no causal link when the decision-maker conducted an independent investigation.[6]

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[6] Petitioner contends the "Seventh Circuit held, however, that an employer is never liable when the nominal decision-maker consults any other source before making the adverse employment decision." (*See* Pet. Brief, page 12). The court only held that "the employer is not liable for an

Most notably, Petitioner focuses on the *dicta* in *Brewer* and disregards the court's ultimate conclusion - that any causal link between Thompson's alleged conduct and the employment action was cut off because Hendricks performed an independent investigation. (App. at 25a-26a).

Petitioner, in short, concedes it is "possible to reconcile" his cited cases and the formulations that he characterizes as the "influence" and "causation" standards. *See* Pet. Brief, page 23. His attempt to create a conflict on the basis that there is some separate and independent "actual decision-maker" standard in the Fourth and Seventh Circuits raises a distinction for which there is no difference. All of the Circuits have applied a "results in" approach for determining whether an employer should be liable for a supervisor's discriminatory animus and Petitioner's Petition should be denied.

II. In any event, this case is not a proper vehicle for considering that issue because resolution of that issue would not alter the outcome.

Assuming, *arguendo*, that a different "standard" were applied in this case, the outcome would still be the same because Hendrick's independent evaluation broke any causal link between Thompson's alleged bias and the adverse employment action. Accordingly, this case presents a poor vehicle for considering the legal question posed in the Petition, since resolution of that issue is unlikely to alter the outcome of this case.

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employee's submission of misinformation to the decision maker" when it "conducts its own investigation into the facts relevant to the decision". (App. at 23a).

Courts agree that an employer will not be liable for a biased supervisor's conduct when a non-biased decision-maker conducts an independent investigation before making an adverse decision. *See, e.g., Collins v. New York City Transit Authority*, 305 F.3d 113, 119 (C.A.2 2002)(no inference of discrimination where arbitration board made an independent inquiry); *Hill*, 354 F.3d at 297, *Long*, 88 F.3d at 306-07; *Wilson*, 952 F.2d at 946(biased supervisor was not the cause of plaintiff's discharge because the decision was based upon an independent investigation); *Brewer*, 479 F.3d at 918; *Lacks*, 147 F.3d at 725 (finding cat's paw theory was not applicable when the board made an independent determination that the plaintiff should be fired); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (C.A. 9 2003); *BCI*, 450 F.3d at 486 (employer may escape liability by performing independent investigation); *Llampallas*, 163 F.3d at 1249 (causal link broken because decision-maker made an independent investigation).

The facts are undisputed in this case that Thompson merely relayed information that she had received from Parking Services to Hendricks. Thompson did not make any recommendation to Hendricks and Hendricks did not discuss her decision with Thompson. Moreover, Hendricks conducted her own review of the matter before she, alone, made the decision to terminate the Petitioner's assistantship one month early. Under these facts, Hendricks' independent investigation, her independent decision to take the employment action, and Petitioner's admission that he had altered the parking tag and understood what he did was wrong, severed any causal link between Thompson's relaying of information and the adverse employment action that was taken.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

James C. Kearns
Heyl, Royster, Voelker & Allen
102 E. Main Street, Suite 300
Urbana, IL 61801
(217) 344-0060
Counsel for Respondent

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IN THE

Supreme Court of the United States

LONNELL BREWER,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

MICHAEL FOREMAN
Counsel of Record
SARAH CRAWFORD
DARIA E. NEAL
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave. NW
Suite 400
Washington, DC 20005
(202) 662-8600

JOANNA C. FRYER
Attorney at Law
5555 N. Sheridan Road
Suite 241
Chicago, IL 60640
(773) 275-7375

MICHAEL B. DE LEEUW
DARCY M. GODDARD
VIVEK REDDY
SARAH L. HINCHLIFF
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8000

Attorneys for Petitioner

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In opposing *certiorari*, Respondent attempts to divert attention from the indisputable split of authority among and within the circuit courts of appeals on the issue of employer liability for intermediate supervisor bias. To do so, Respondent seriously misconstrues relevant precedent. Respondent also argues disputed "facts" that are not only irrelevant to the decision whether to grant *certiorari*, but that are also improperly argued given the procedural posture of the case.

In the prior Term, the Court granted a writ of *certiorari* on the same issue in controversy here, i.e., "[u]nder what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, when the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee." Pet. for Writ of *Certiorari*, *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 450 F.3d 476 (10th Cir. 2004); *cert. granted*, 127 S. Ct. 852 (U.S. Jan. 5, 2007) (No. 06-341); *cert. dismissed*, 127 S. Ct. 1931 (U.S. Apr. 12, 2007). Incredibly, Respondent nonetheless maintains that "there is no actual conflict among the circuits" (Resp. Br. at 6), and seeks to prove its point by piecing together language from the various lower court opinions in a vain effort to create the appearance of consistency (*id.* at 6-12). In so doing, however, Respondent powerfully illustrates the ambiguity and uncertainty resulting from the inconsonant holdings and inconsistent language found in the lower courts' intermediate supervisor bias, or "cat's paw," cases.

Respondent also inappropriately argues the "facts" of the case in an attempt to discourage this Court's review of the legal issue presented. Yet, as Respondent acknowledges (Resp. Br. at 5-6 n.3), based on the procedural posture of the case, the Court must view all disputed facts in the light most favorable to Petitioner. As the Seventh Circuit held below (Pet. at 20a-21a), the facts are more than sufficient to find at the summary judgment stage that Petitioner was subjected to the racial bias of an intermediate supervisor, and that the intermediate supervisor's bias played a crucial role in Petitioner's termination. The legal issue, then, is clearly presented: whether an employer, whose decision was influenced by an intermediate supervisor's discriminatory bias, can be held liable under Title VII, and, if so, the correct legal standard to impose liability. The Court's answer to that question will not only determine the fate of Petitioner's case, but it will also provide much-needed guidance to employees, employers, and the trial and appellate courts deciding these cases.

I. There is a Significant Circuit Split on the Appropriate Standard for Dealing With Intermediate Supervisor Bias.

As demonstrated by Petitioner (Pet. at 15-22), there is a significant circuit split regarding the appropriate standard to impose Title VII liability when an intermediate supervisor's bias is a factor in an adverse employment action. This Court has twice recognized a need to resolve this split. As discussed *supra*, the Court granted *certiorari* on this issue just last Term in *BCI*. Prior to that, in 2005, the Court asked the Solicitor General to file a brief expressing the views of

the United States on this issue in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc); *pet. for cert. dismissed*, 543 U.S. 1132 (U.S. January 25, 2005) (No. 03-1443). In both cases, however, the Court was precluded from clarifying the correct legal standard because the parties withdrew the cases before the Court could consider the issue.

Although many courts, including the Tenth Circuit in *BCI*, 450 F.3d at 486-88, and the Seventh Circuit in this case (Pet. at 26a-27a), have expressly acknowledged both the circuit split and the multiplicity of standards, Respondent disingenuously attempts to confuse the Court by asserting that, despite widely varying language in their opinions, lower appellate courts have "uniformly" applied a "results in" standard. (Resp. Br. at 7.) That is simply incorrect.

First, the "results in" standard for which Respondent argues has no basis in either the language of Title VII[1] or the cases decided by the lower courts—including those cited by Respondent. The "results in" standard, instead, introduces a brand new terminology in a futile attempt to synthesize the diverse lower court opinions. Far from helping its argument, Respondent's academic exercise works only to demonstrate further the extent to which the lower courts are deciding intermediate supervisor bias cases based on ambiguous and inconsistent legal formulations.

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[1] Title VII provides: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added).

Second, the "results in" standard urged by Respondent would effectively repeal the 1991 amendment to Title VII. Congress sought in 1991 to clarify the standard of causation in Title VII cases, making clear that a plaintiff can establish an unlawful employment practice if race was "a motivating factor" in the final decision. (Pet. at 24-26.) If this Court were to adopt the "results in" standard, it would render meaningless the 1991 amendment; the "results in" standard is concerned only with whether the intermediate supervisor's bias resulted in a tangible employment decision and not whether that bias was a "motivating factor" in the decision.

Respondent's misstatement of the cases is best exemplified by its assertion that the Fourth Circuit's decision in *Hill* is consistent with cases from other circuits. (Resp. Br. at 11-12.) In *Hill*, the Fourth Circuit expressly distinguished itself from its sister circuits, which have permitted an employer to be found liable when a biased intermediate supervisor played a role in an adverse employment action. 354 F.3d at 289-290. The Fourth Circuit required instead that the intermediate supervisor be the "actual decision-maker." *Id.* at 291. The Fourth Circuit's deviation from other circuits is unmistakable, and other courts have repeatedly recognized its unique approach. Only three years ago, for example, the Seventh Circuit explicitly *rejected* the Fourth Circuit's "actual decision-maker" standard. *Lust v. Sealy*, 383 F.3d 580, 584 (7th Cir. 2004) (noting that the Fourth Circuit's standard for employer liability in intermediate supervisor bias cases "is not the view of this court"). The Tenth Circuit also explicitly rejected the Fourth Circuit's "actual decision-

maker" standard, stating: "[That] standard . . . undermines the deterrent effect of subordinate bias claims, allowing employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker." *BCI*, 450 F.3d at 487.

II. Resolving this Issue is Necessary to Prevent Continued Confusion in the Lower Courts and to Provide Clear Guidance to Employees and Employers Alike.

This case presents another opportunity for the Court to resolve substantial confusion among the lower courts, which are often forced to choose between and apply conflicting legal standards. (*See* Pet. at 22-23.) In the limited time since Mr. Brewer's Petition was filed, the lower courts have continued to struggle to understand and apply the several competing standards for employer liability. For example, in *Poland v. Chertoff*, No. 05-35508, 2007 WL 2069651, at *5-*6 (9th Cir. July 20, 2007), the court acknowledged the continued inconsistency in the law as it "consider[ed] three potential rules to govern when a subordinate's bias will be imputed to an employer": (i) the "but for" causation standard articulated in *BCI*; (ii) the "actual decision-maker" standard articulated in *Hill*; and (iii) the "influence" standard articulated in *Bergene v. Salt River Project Agricultural Improvement Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001), and *Laxton v. Gap, Inc.*, 333 F.3d 572, 584 (5th Cir. 2003).[2]

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[2] The *Poland* court ultimately utilized the "influence" standard, holding that,

If the various federal courts have such trouble consistently interpreting these conflicting legal precedents, then employers and employees clearly do not have the direction they need to determine their rights and obligations in situations involving intermediate supervisor bias. Large corporations may justifiably believe that the extent of their liability in such cases varies depending on the geographic location of the office where the bias manifests. There are real-life implications to the uncertainty in the federal courts. Without guidance from this Court, these fissures in Title VII analysis will only widen.

III. This Case is a Proper Vehicle for the Court to Decide the Correct Legal Standard in Intermediate Supervisor Bias Cases.

Realizing, perhaps, that its argument on the case law is, at best, unconvincing, Respondent seeks to divert the Court's attention by arguing "facts" that are not only irrelevant to the decision whether to grant *certiorari*, but that are also improperly argued given the procedural posture of the case.

For example, Respondent alleges that Petitioner altered the parking tag "without having any

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> [I]f a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the *allegedly independent* adverse employment decision was *not actually independent* because the biased subordinate influenced or was involved in the decision or decisionmaking process.

Poland, 2007 WL 2069651, at *20 (emphasis added).

permission to do so." (Resp. Br. at 3.) This claim is decidedly false if viewing the facts in the light most favorable to Petitioner. Petitioner's immediate supervisor, Kerrin Thompson, indicated to Petitioner that he could use the parking tag to park at the Personnel Services Office (PSO) or the building where the University's Institute of Labor and Industrial Relations (ILIR) resided. (Pet. at 3a-4a.) Having received from Ms. Thompson permission to use the tag for the ILIR lot, Petitioner reasonably could have believed that he had permission to write that lot number on the tag. Whether Petitioner's belief was reasonable, and whether Ms. Thompson was motivated by racial bias when she deliberately hid from Denise Hendricks the fact that Ms. Thompson had given Petitioner permission to park in either lot, are questions of credibility for a jury to decide.[3]

The Court should not be diverted by Respondent's attempt to distract from the important legal issues presented by the case. The Seventh Circuit found that there was sufficient evidence in the record for a jury to conclude that Ms. Thompson was racially biased and that her racial bias influenced Ms. Hendricks' decision to fire Petitioner. (Pet. at 20a-21a.) Indeed, it is undisputed that Ms. Thompson reported negative information about Petitioner to Ms. Hendricks

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[3] Respondent also argues extraneous, non-record "facts" about the distance of the ILIR parking lot from the PSO (Resp. Br. at 3), presumably in an attempt to discredit Petitioner's testimony that Ms. Thompson authorized him to park at the ILIR lot when she gestured and said he could park "anywhere at the PSO" (Pet. at 3a-4a). On a motion for summary judgment, that type of negative inference may not be made against the non-moving party.

(Pet. at 4a-5a, 7a-8a), and it is undisputed that Ms. Hendricks trusted Ms. Thompson's judgment (Dep. of D. Hendricks, 38:4-15[4]). The negative information relayed by Ms. Thompson to Ms. Hendricks and others consisted not only of information about the parking tag incident (which omitted key exculpatory information about the incident), but also a persistent stream of complaints about Mr. Brewer's attire, the number of hours he worked, and his supposed "lack of urgency." (Pet. at 4a-5a, 7a-8a.) Thus, although Ms. Hendricks testified that she alone determined to fire Petitioner (Pet. at 11a), the facts amply support an inference that, by the time she decided to fire him, Ms. Hendricks' opinion of Petitioner was significantly and irrevocably tainted by the biased information she had received previously from Ms. Thompson. By then, it was virtually impossible for Ms. Hendricks to view the parking tag incident through an objective, independent lens. A jury applying the correct legal standard is the most appropriate means to gauge Ms. Hendricks' credibility on this issue.

Finally, Respondent argues that Ms. Hendricks' "independent investigation" of the facts before firing Petitioner was sufficient to sever the causal link between Ms. Thompson's racial bias and the adverse employment action. (Resp. Br. at 19-20.) But Ms. Hendricks did *nothing* to investigate the situation independently before deciding to fire Petitioner. By

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[4] That Ms. Thompson's complaints about Petitioner influenced Ms. Hendricks' view of him is shown by, among other things, the fact that Ms. Hendricks relayed the substance of Ms. Thompson's complaints to Peter Feuille, the Director of Petitioner's degree program. (Pet. at 7a-8a.)

her own account, Ms. Hendricks resolved to fire Petitioner before getting his side of the story, and her one act of "investigation" was to look at the parking tag.[5] (Pet. at 12a.) Ms. Hendricks also admitted that, if she had known about the situation with Ms. Thompson, that knowledge would have "led to further conversation." (*Id.*) Given that Ms. Hendricks herself acknowledged that the parking tag incident, without more, would not ordinarily result in termination (Pet. at 11a), her failure adequately to investigate the incident is especially telling; a jury could reasonably conclude that Ms. Hendricks considered the parking tag incident the "last straw" after hearing all Ms. Thompson's other complaints about Petitioner, and so Ms. Hendricks fired him when she otherwise would not have.[6] That, of course, is a classic intermediate supervisor bias situation.

Contrary to Respondent's argument (Resp. Br. at 20), the fact that Petitioner may have told Ms. Hendricks that he did something "wrong" by altering the parking tag does nothing to prove that the decision

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[5] Ms. Hendricks denies she was ever told about Ms. Thompson's racism or the implicit permission Ms. Thompson gave Petitioner to alter the parking tag. (Pet. at 12a.) By contrast, Petitioner testified that he informed Ms. Hendricks of Ms. Thompson's racism during the meeting following Ms. Hendricks' decision to fire him. (Pet. at 12a, 56a.) Under either view of the facts, it cannot reasonably be disputed that Ms. Hendricks did not conduct an independent investigation before deciding to terminate Petitioner.

[6] A jury might also reasonably conclude that Ms. Hendricks herself was racially biased, given that she fired Petitioner for the parking tag incident when, by her own admission, that incident ordinarily would not have resulted in termination.

to terminate his employment was not motivated, at least in part, by racism. The determinative question here is simple: Would Ms. Hendricks have fired Petitioner if her opinion of Petitioner had not been poisoned by racially biased information provided to her by Ms. Thompson, or if Ms. Thompson had not withheld from Ms. Hendricks crucial exculpatory information about Petitioner and the parking tag? There is substantial record evidence indicating that Ms. Hendricks would not have done so. Petitioner is entitled to have a jury decide that question once the correct legal standard is articulated by the Court.[7]

CONCLUSION

The Court should act as it did in *BCI* and grant *certiorari* so that a consistent legal standard can be articulated to guide the lower courts, employees, and employers as they confront this important legal issue.

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[7] When a district court applies an incorrect legal standard in an area in which that court has discretion, and the record would permit the district court to exercise its discretion in either direction, the appellate court should remand to allow the district court to decide the issue in the first instance. *See Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 438-439 (1996); *cf. Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

Respectfully submitted this 13th day of September, 2007.

Michael Foreman
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Suite 400
Washington, DC 20005
(202) 662-8600
Counsel for Petitioner